S. Hrg. 101-121

HYDROELECTRIC FAIRNESS ACT OF 1989

HEARING

BEFORE THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 635

TO PREVENT THE UNINTENDED LICENSING OF FEDERALLY NONJURISDICTIONAL PRE-1935 UNLICENSED HYDROELECTRIC PROJECTS

MAY 18, 1989

Printed for the use of the
Committee on Energy and Natural Resources

U.S. GOVERNMENT PRINTING OFFICE
19-853 WASHINGTON : 1989

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S311-53

19-853 - 89 - 1

COMMITTEE ON ENERGY AND NATURAL RESOURCES

J. BENNETT JOHNSTON, Louisiana, *Chairman*

DALE BUMPERS, Arkansas
WENDELL H. FORD, Kentucky
HOWARD M. METZENBAUM, Ohio
BILL BRADLEY, New Jersey
JEFF BINGAMAN, New Mexico
TIMOTHY E. WIRTH, Colorado
KENT CONRAD, North Dakota
HOWELL T. HEFLIN, Alabama
JOHN D. ROCKEFELLER IV, West Virginia

JAMES A. McCLURE, Idaho
MARK O. HATFIELD, Oregon
PETE V. DOMENICI, New Mexico
MALCOLM WALLOP, Wyoming
FRANK H. MURKOWSKI, Alaska
DON NICKLES, Oklahoma
CONRAD BURNS, Montana
JAKE GARN, Utah
MITCH McCONNELL, Kentucky

Daryl Owen, *Staff Director*
D. Michael Harvey, *Chief Counsel*
Frank M. Cushing, *Staff Director for the Minority*
Gary G. Ellsworth, *Chief Counsel for the Minority*

Subcommittee on Water and Power

BILL BRADLEY, New Jersey, *Chairman*
KENT CONRAD, North Dakota, *Vice Chairman*

WENDELL H. FORD, Kentucky
HOWARD M. METZENBAUM, Ohio
HOWELL T. HEFLIN, Alabama

CONRAD BURNS, Montana
MARK O. HATFIELD, Oregon
JAKE GARN, Utah
MALCOLM WALLOP, Wyoming

J. Bennett Johnston and James A. McClure are Ex Officio Members of the Subcommittee

Russell R. Brown, *Senior Professional Staff Member*

CONTENTS

Page

S. 635 3

STATEMENTS

Bradley, Hon. Bill, U.S. Senator from New Jersey 1
Burns, Hon. Conrad, U.S. Senator from Montana 5
Echeverria, John D., general counsel, American Rivers 122
Heflin, Hon. Howell T., U.S. Senator from Alabama 5
Marshall, Malcolm, Edison Electric Institute 134
McClure, Hon. James A., U.S. Senator from Idaho 6
Murphy, Michael W., system attorney, Niagara Mohawk Power Corp 154
Nygaard, Kristina, Assistant General Counsel, Hydroelectric Licensing, Federal Energy Regulatory Commission, accompanied by Mark Robinson 23
Roque, Victor A., vice president, general counsel and secretary, Orange and Rockland Utilities, Inc., accompanied by Frank E. Fischer 67
Turner, John M., director, government affairs, Georgia-Pacific, Corp 120

HYDROELECTRIC FAIRNESS ACT OF 1989

THURSDAY, MAY 18, 1989

U.S. Senate,
Subcommittee on Water and Power,
Committee on Energy and Natural Resources,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room SD-366, Dirksen Senate Office Building, Hon. Bill Bradley, presiding.

OPENING STATEMENT OF HON. BILL BRADLEY, U.S. SENATOR FROM NEW JERSEY

Senator **Bradley**. The subcommittee will come to order. Our hearing today is on S. 635, the Hydroelectric Fairness Act of 1989. This bill would remedy a problem in the Federal Energy Regulatory Commission's administration of Hydroelectric Licensing under the Federal Power Act. Under the Act, most hydroelectric projects must receive a license. However, a certain category of projects, those constructed on nonnavigable waters prior to August 26, 1935, and on which there has not been construction since that date, are not subject to the licensing requirement.

For more than 50 years, these nonjurisdictional projects have operated without any Federal interference. Recently, however, FERC has upset settled expectations by ruling that it will accept license applications for these nonjurisdictional projects from third parties, as well as voluntary applications by project owners. The policy of allowing third parties to file license applications for nonjurisdictional projects is disturbing to me on a number of accounts.

First, it is difficult to believe that Congress intended such a result from the Federal Power Act. It stretches the imagination to say that on the one hand Congress would create a category of projects not required to be licensed and, on the other hand, intend such projects to be subject to competition without saying so explicitly.

Second, it appears that one incentive for third parties to file license applications for unlicensed projects lies in the fact that they may be converted into qualifying facilities under PURPA. Under this scenario, a third party could use the power of eminent domain, which is granted with the license, to acquire an unlicensed project from the utility at its depreciated value and then sell power from the project back to the utility at high, avoided cost rates. Why should the utility consumers be disadvantaged by this gaming of the regulatory system?

Less this scenario seem purely hypothetical, the utility in my own State, Orange and Rockland Utilities, is facing exactly this situation right now.

Third, many of the nonjurisdictional hydroelectric projects dealt with in S. 635 are very small. The licensing of such projects at a typical cost of hundreds of thousands of dollars could render them uneconomical from a ratepayer's standpoint. Yet, FERC's current policy creates this risk.

Fourth, we hear constantly of how FERC's staff resources in the hydroelectric area are stretched very thin, a situation that will only get worse is the bulk of currently licensed projects come in for relicensing in the 1990's. It hardly makes sense to add a whole new category of projects to the Commission's existing hydroelectric responsibilities.

Finally, in the absence of Federal jurisdiction, these projects are not simply left to their own devices. They are subject to comprehensive state power in such areas as safety and the environment.

I am not unmindful of the fact that the basic policy of the Federal Power Act favors competition. Nevertheless, in this case for the reasons I have outlined, the public interest seems to favor protecting the owners of pre-1935 nonjurisdictional projects. S. 635 would achieve this protection by prohibiting FERC from issuing a license for nonjurisdictional projects to anyone other than the current owners.

[The text of S. 635 follows:]

II

101st CONGRESS
1st Session

S. 635

To prevent the unintended licensing of federally nonjurisdictional pre-1935 unlicensed hydroelectric projects.

IN THE SENATE OF THE UNITED STATES

March 16 (legislative day, January 3), 1989

Mr. McClure (for himself, Mr. Johnston, Mr. Garn, Mr. Nickles, Mr. Bradley, and Mr. Murkowski) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

---

A BILL

To prevent the unintended licensing of federally nonjurisdictional pre-1935 unlicensed hydroelectric projects.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be referred to as the "Hydroelectric Fairness Act of 1989".

Sec. 2. Part I of the Federal Power Act (16 U.S.C. 791a et seq.) is amended by adding the following new section at the end thereof:

"Sec. 32. The Commission is prohibited from issuing an original license for any project works located on nonnavigable waters and on which there has been no construction within the meaning of section 23(b) since August 26, 1935, to any person, State or municipality other than the owner of the project works.".

Senator **Bradley**. I think we have a good set of witnesses today, and before beginning with the witnesses I would like to recognize Members of the committee in case they have an opening statement. Senator Heflin.

STATEMENT OF HON. HOWELL T. HEFLIN, U.S. SENATOR FROM ALABAMA

Senator **Heflin**. Thank you, Mr. Chairman. I commend you for holding this hearing to focus on the problems being faced by the owners and the operators of nonjurisdictional hydroelectric projects. These projects are nonjurisdictional because they were built before 1935 on nonnavigable streams. Usually, they are quite small, although their fuel-free electric generation is valuable to our overall national energy picture.

These individual projects are not usually able to bear the significant cost of the Federal hydroelectric licensing process and still be economical. If they are forced to obtain Federal licenses, the costs would drive the owners of these projects to take them out of service. Apparently, FERC acknowledges that it has no power to require the owners of these projects to submit to Federal licensing but has asserted it can nevertheless issue licenses to any interested volunteer who might apply. FERC presents the owner of the project with an unfair dilemma. Volunteer for a license, the cost of which may make your project uneconomical, or risk the prospect of a third party opportunist obtaining a license and utilizing the eminent domain powers granted with that license to take the project away.

Mr. Chairman, I support S. 635 because it eliminates the obvious unfairness of the third party claim-jumping available under FERC's newly developed volunteer licensing authority. Under the bill, only the owner can take advantage of FERC's authority to license volunteer applicants. I want it understood, however, that FERC does not presently have authority to require the licensing of these projects, and, most importantly, that S. 635, if enacted into law, would in no way allow FERC to require the licensing of such projects. I believe the bill's sponsor, my colleague from Idaho, Mr. McClure, agrees with this understanding of the existing law and the bill.

These clean and efficient hydro power resources have operated safely since at least before 1935 without FERC's oversight and licensing. Considering the cost of that cumbersome process as applied to these unique resources, fairness requires that they remain free of federal licensing requirement unless the owners decide voluntarily to the contrary. Thank you, Mr. Chairman.

Senator **Bradley**. Senator Burns.

STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Senator **Burns**. Thank you, Mr. Chairman. I applaud you for these hearings. I would like to take this opportunity to thank our distinguished panels for appearing today. Mr. Chairman, although this is not an issue in which Montana is directly affected, it is of obvious concern to roughly 350 pre-1935 hydroelectric facilities scattered throughout 35 States. The recent developments involving Orange and Rockland Utilities and the Rio Hydroelectric Associates could set a precedent which could significantly alter the current structure as we now know it.

There are a number of important factors that must be considered during the course of this hearing. One has to deal with the cost associated with allowing an outsider to file and subsequently obtain a license to operate a pre-1935 project. As we all are aware, the Public Utility Regulatory Policy Act of 1978 requires electric utilities to purchase power from qualifying facilities at full avoided cost whether or not they want to. These costs would then be passed on to utilities customers through higher electricity prices.

Orange and Rockland estimates that losing the license would require them to pay $50 million to Rio Hydro over the next 30 years, a substantial sum to be picked up by the consumer.

There are many who believe that we could avoid the entire problem by simply requiring pre-1935 facilities to obtain a license. I have two problems with this scenario—cost and States' rights. Many of the utilities we are discussing are not the large-scale operations. The cost of licensing could run into the hundreds of thousands of dollars risking the viability of any utility seeking to obtain one.

Second, once a project is licensed, it is taken out of the State's regulatory jurisdiction, and the Federal Government dictates how the project will be operated and maintained. Mr. Chairman, any time the Federal Government infringes on States' rights, I have very serious reservations.

For these reasons, Mr. Chairman, I look forward to the testimony today. I would like to again thank you and this distinguished panel.

Senator **Bradley**. Thank you very much, Senator Burns.

Senator McClure.

STATEMENT OF HON. JAMES A. McCLURE, U.S. SENATOR FROM IDAHO

Senator **McClure**. Thank you very much, Mr. Chairman. First, let me thank you for holding this hearing and thank you and others for being co-sponsors of the legislation. I want to make a very brief statement. I ask that my statement be included in the record in full.

Senator **Bradley**. Without objection, so ordered.

Senator **McClure**. The bill we are today considering would prevent claim-jumping by limiting the issuance of a Federal license to the project's owner. In other words, the bill says that the owner gets to keep its project, and that is only fair. After all, this problem occurs because in 1935 Congress told existing project owners that they did not need to obtain a Federal license. It is only because of a recently discovered quirk in Federal law that the reliance on Congress' intent in the 1935 Act today exposes project owners to potential loss of their project. That is not only unfair, it is bad public policy.

It is important to note that this bill would not in any way limit, restrict or affect the Commission's exercise of its duties and obligations under the Federal Power Act to ensure that a license would be in the overall public interest. Likewise, it would not prevent the Commission from including any license for the project necessary in appropriate fish and wildlife protection, mitigation and enhancement terms. Nor would it prevent the Commission from making sure that a licensed project is safe.

This bill would not require the licensing of a facility where existing law does not so require, nor could it be interpreted to authorize the Commission to require a person to make use of the Federal Power Act's 4(e) authority to voluntarily obtain a license. All aspects of existing law other than who may obtain license for these projects are left untouched.

Rather than take the subcommittee's time to go into a great deal of background as to how this problem developed and how this bill will solve it, I ask unanimous consent that my introductory statement on S. 635 and the minority staff background memorandum be included in the hearing record.

Senator **Bradley**. Without objection, so ordered.

Senator **McClure**. It will be made obvious by today's hearing that this legislation is needed, that it is justified, and that it would be in the public interest.

But before we begin the hearing, I would like to note of a related matter, that of the Commission's efforts to find a way to make nonjurisdictional projects subject to the Commission's jurisdiction. I am somewhat perplexed with the Commission's so-called unlicensed hydro program. As I understand it, the Commission is actively seeking to pull into their jurisdiction projects which are not now federally jurisdictional.

That troubles me from a number of perspectives, particularly with respect to both water rights and States' rights. I do not understand why the Commission is seeking to do this, and I understand that at least one witness will testify today on that issue. I hope to learn more about what is going on and why it is going on. I look forward to hearing from today's witnesses.

Again, Mr. Chairman, I wish to thank you for your participation and interest.

[The prepared statement of Senator McClure and the minority staff background memorandum follow:]

Statement of Senator James A. McClure
Ranking Republican Member
Committee on Energy and Natural Resources

Subcommittee on Water and Power
Hearing on S. 635, The Hydroelectric Fairness Act of 1989
May 18, 1989

Good afternoon. I want to thank the Subcommittee Chairman, Senator Bradley, for holding this hearing.

Today the Subcommittee on Water and Power is holding a legislative hearing on S. 635 which I, along with Senators Johnston, Garn, Nickles, Bradley and Murkowski, introduced on March 16. Senator Lautenberg has since become a cosponsor.

The purpose of this bill is to stop the misuse by third parties of Federal law to obtain a license for someone else's pre-1935 unlicensed hydroelectric project -- to stop "claim jumping" in other words. The bill does so by providing that only the owner of the project can obtain a licence for the project.

The hydroelectric projects which this bill would protect were built prior to 1935 on non-navigable rivers and remain in their original operating condition. There are about 350 of these unlicensed projects which are today at risk of being claim jumped. They are owned by electric utilities, municipalities, irrigation districts, private industry and others, and they are located in 35 States plus Puerto Rico.

These projects have been owned and operated for more than 50 years without a license. Their loss would have serious economic consequences to their owners and the consumers of the electricity they produce; loss of a project would force the owner to replace the lost low-cost power with purchased high-cost power. It has been calculated that the loss of just one modest-sized project -- one the size of Orange and Rockland's Rio project, which is today the target of a claim jumper -- would cost a utility's customers $50 million in higher electricity bills over the next 30 years.

We know that there are at least three hydro projects today under assault by claim jumpers, and that is just the proverbial "tip of the iceberg." If claim jumpers get away with these projects, each and every one of the 350 existing unlicensed operating hydro projects may become the next "target of opportunity."

Even if a claim jumper does not ultimately succeed in grabbing a project, the owner will be forced to spend a large amount of money to protect its interests. Moreover, the claim jumper may benefit from its efforts in the same way that corporate raiders benefit from failed takeover attempts.

The bill we are today considering would prevent claim jumping by limiting the issuance of a Federal license to the project's owner. In other words, the bill says that the owner gets to keep its project; and that's only fair. After all, this problem occurs because in 1935 Congress told existing project owners that they did not need to obtain a Federal license. It is only because of a recently discovered quirk in Federal law that the reliance on Congress' intent in the 1935 Act today exposes project owners to potential loss of their project. That's not only unfair, it's bad public policy.

It is important to note that this bill would not in any way limit, restrict or affect the Commission's exercise of its duties and obligations under the Federal Power Act to ensure that a license would be in the overall public interest; likewise it would not prevent the Commission from including in a license for the project necessary and appropriate fish and wildlife protection, mitigation and enhancement terms; nor would it prevent the Commission from making sure that a licensed project is safe. This bill would not require the licensing of a facility where existing law does not so require, nor could it be interpreted to authorize the Commission to require a person to make use of the Federal Power Act's 4(e) authority to voluntarily obtain a license. All aspects of existing law, other than who may obtain a license for these projects, are left untouched.

Rather than take the Subcommittee's time to go into a great deal of background as to how this problem developed and how this bill would solve it, I would ask unanimous consent that my introductory statement on S. 635 and the Minority Staff background memorandum be included in the hearing record.

It will be made obvious by today's hearing that this legislation is needed, that it is justified, and that it would be in the public interest. But before we begin the hearing, I would like to take note of a related matter, that of the Commission's efforts to find a way to make non-jurisdictional projects subject to the Commission's jurisdiction.

I am somewhat perplexed with the Commission's so-called "unlicensed hydro" program. As I understand it, the Commission is actively seeking to pull into their jurisdiction projects which are not now Federally jurisdictional. That troubles me from a number of perspectives, particularly with respect to both water rights and State rights. I do not understand why the Commission is seeking to do this, and I understand that at least one witness will testify today on that issue. I hope to learn more about what is going on and why it is going on. I look forward to hearing from today's witnesses.

J. BENNETT JOHNSTON, LOUISIANA, CHAIRMAN

DALE BUMPERS, ARKANSAS
WENDELL H. FORD, KENTUCKY
HOWARD M. METZENBAUM, OHIO
BILL BRADLEY, NEW JERSEY
JEFF BINGAMAN, NEW MEXICO
TIMOTHY E. WIRTH, COLORADO
KENT CONRAD, NORTH DAKOTA
HOWELL T. HEFLIN, ALABAMA
JOHN D. ROCKEFELLER IV, WEST VIRGINIA

JAMES A. McCLURE, IDAHO
MARK O. HATFIELD, OREGON
PETE V. DOMENICI, NEW MEXICO
MALCOLM WALLOP, WYOMING
FRANK H. MURKOWSKI, ALASKA
DON NICKLES, OKLAHOMA
CONRAD BURNS, MONTANA
JAKE GARN, UTAH
MITCH McCONNELL, KENTUCKY

DARYL OWEN, STAFF DIRECTOR
D. MICHAEL HARVEY, CHIEF COUNSEL
FRANK M. CUSHING, STAFF DIRECTOR FOR THE MINORITY
GARY G. ELLSWORTH, CHIEF COUNSEL FOR THE MINORITY

United States Senate
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, DC 20510-6150

May 17, 1989

MEMORANDUM

TO : Republican Members
Energy LAs
Committee on Energy and Natural Resources

FM : Howard Useem
Professional Staff Member

RE : Hearing on S. 635, The Hydroelectric Fairness Act of 1989

On Thursday, May 18, 1989, the Subcommittee on Water and Power will hold a legislative hearing on S. 635, a bill "to prevent the unintended licensing of federally nonjurisdictional pre-1935 unlicensed hydroelectric projects." The hearing will be held in the Committee hearing room, SD-366, and will begin at 2:00 p.m.

The witnesses appearing at the hearing will be representatives of the Federal Energy Regulatory Commission, the Orange and Rockland Utilities (on behalf of itself and the Edison Electric Institute and accompanied by a Kentucky Utilities representative), the American Paper Institute, and American Rivers.

Background

On March 16, 1989, Senator McClure, along with Senators Johnston, Garn, Nickles, Bradley and Murkowski, introduced the "Hydroelectric Fairness Act of 1989." Senator Lautenberg was subsequently added as a cosponsor.

The intent of this legislation is to prohibit non-owners ("third parties") from obtaining a license for a pre-1935 unlicensed hydroelectric project owned by someone else. "Claim jumping" in the vernacular.

There are an estimated 350 of these unlicensed projects which are located in 35 States plus Puerto Rico. They are owned by electric utilities, municipalities, irrigation districts, private industry and others.

These projects are at risk to being claim jumped because they don't have the protection of a Federal license; and they don't have a license because in 1935 Congress "grandfathered" them from Federal jurisdiction and the requirement to be licensed.

In 1935, Congress modified the Federal hydroelectric licensing system (the Federal Water Power Act of 1920) by enacting amendments which created the Federal Power Act ("FPA") under which we operate today.

The FPA's licensing provisions require only "new" (i.e., post August 26, 1935) hydroelectric projects to obtain a license. Pre-1935 projects located on non-navigable rivers were grandfathered from Federal jurisdiction and the Act's requirement to obtain a license. This exclusion remains so long as no new construction takes place on the project; if new construction occurs (other than normal maintenance and repair), Federal jurisdiction does attach and a Federal license must be obtained.

By relieving pre-1935 projects from the requirement to obtain a license, it would appear that Congress inadvertently enabled third parties to use the licensing system to claim jump these unlicensed projects, although case law is not entirely settled on this point. It would appear that the licensing system can be used to do so in two different ways.

First, a claim jumper could seek a license for an unlicensed project by proposing new construction; increasing the height of the dam or installing a larger turbine, for example. This new construction would make the project jurisdictional, thereby triggering the FPA's licensing requirements (Sec. 23(b)). But because it would appear that *there is nothing in the FPA which requires the license applicant to be the project owner*, FERC could issue the license for the project to a non-owner applicant. And the claim jumper can get the project even if the owner does not want to give it up. Once the claim jumper obtains the license, it can use the FPA's power of eminent domain to condemn the project and obtain title. When establishing the Federal licensing system back in 1935, Congress apparently failed to foresee this possible result.

There is a second provision of the FPA (Sec. 4(e)) which it also appears can be used by third parties to claim jump an unlicensed project, but in this case the claim jumper doesn't have to propose any project improvements. This is because section 4(e) has been interpreted by the Federal Energy Regulatory Commission and the Federal courts as allowing the "voluntary" licensing (i.e., at an applicant's request) of an unlicensed project. But again, as with section 23(b) of the FPA, it would appear that there is nothing in section 4(e) which requires the applicant to be the owner of the project; any person can file to obtain a license. This possibility was recently noted by a Federal court which stated that:

> ...pre-1935 project owners [are] at risk because volunteer applicants need not be project owners. *Thus, the owner of a project not requiring a license may find himself the target of a license application by strangers*.
>
> *Cooley v. FERC*, 843 F.2d 1464, 1470 (D.C. Cir., 1988) Emphasis added.

One might ask: Why don't the owners of these unlicensed projects simply apply for a license? After all, if they had a license, wouldn't they be protected?

There are several significant reasons why owners are reluctant to seek the protection of a Federal license. First, filing for a license is a direct invitation for others to file a competing application, which is explicitly provided for by the Federal Power Act. And there is no guarantee that the owner-applicant would ultimately obtain the license; the competitor might instead obtain it. While that possibility might not be so significant for a new, undeveloped proposed hydro project, it would be a significant risk for an existing, operating project; its loss would mean an immediate increases in electricity prices for a utility's customers. Second, filing for a license is expensive. It costs several thousands of dollars, and often many hundreds of thousands of dollars, to prepare the documents necessary for a license application. For a smaller project, that cost alone might make it uneconomic and result in its being shut down. Or the additional costs may be passed on to consumers through higher prices. Third, once licensed the project would be taken out of state regulatory jurisdiction; the Federal government would then dictate how the project is to be operated and maintained, not the State.

Despite the existence of these provisions of the FPA for more than 50 years -- and their potential for misuse -- they were not put to use by claim jumpers until very recently.

This situation involves the Orange and Rockland Utilities, an electric utility which serves several thousand residential, commercial and industrial customers in New York, New Jersey, and Pennsylvania. They own one of these pre-1935 unlicensed hydroelectric projects on which an outsider, Rio Hydroelectric Associates, filed for a license. Orange and Rockland has estimated that if they lose the project, they would have to pay $50 million to Rio Hydro over the next 30 years to purchase the power back from that project. In this connection, it should be noted that the Public Utility Regulatory Policies Act of 1978 requires electric utilities to purchase power from "qualifying facilities" at "full avoided cost" whether or not they want to; costs which would then be passed on to a utility's customers through higher electricity prices.

Whether or not Rio Hydro ultimately wins in its efforts to claim jump Orange and Rockland's project, this may be the proverbial "tip of the iceberg." As noted above, there are about 350 of these unlicensed projects scattered throughout the United States. They are located in the States of: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Iowa, Idaho, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Maine, Michigan, Minnesota, North Carolina, Nebraska, New Hampshire, New Jersey, Nevada, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Vermont, Washington, Wisconsin and Puerto Rico. And there already are two other claim jumping efforts going on besides that involving Orange and Rockland.

Summary of S. 635

Generally speaking, S. 635 would give to pre-1935 unlicensed projects the same protection against claim jumpers as is currently enjoyed by owners of licensed projects. It would prevent unlicensed projects from being licensed by third parties by prohibiting the issuance of a license for those projects to any person other than the owner of the project.

Specifically, it does so by prohibiting the Commission "from issuing an original license for any project works located on non-navigable waters and on which there has been no construction within the meaning of section 23(b) since August 26, 1935, to any person, State or municipality other than the owner of the project works." This prohibition would apply in the case of a "voluntary" (Sec. 4(e)) license application, as well as in the case of a mandatory (Sec. 23(b)) license application.

Thus, by limiting the issuance of such licenses to the owner of the unlicensed facility, the bill would eliminate the possibility that a non-owner could obtain a license simply by "volunteering" for one, or by proposing new construction at such facility.

Under this legislation, once the project is licensed this prohibition would no longer apply to that project; when the original license expires, the project would face relicensing competition just as would any other licensed project.

This bill would neither expand or contract the Commission's licensing jurisdiction under Part I of the Federal Power Act; it is only a limitation on who may obtain a license. It would not require the licensing of a facility where existing law does not so require; and specifically it would not authorize the Commission to require a project owner to "volunteer" for a license, as is the case with existing law. The bill does not speak to the validity of the theory of licensing under section 4(e) of the FPA as articulated by FERC in its Clifton Power Corp. decision or the subsequent court decision in Cooley v. FERC, that will ultimately be resolved by the courts. Nor would this bill limit, restrict or affect the Commission's exercise of its duties and obligations under the Federal Power Act to ensure that any license issued would be in the overall public interest, and would contain necessary and appropriate fish and wildlife protection, mitigation and enhancement measures.

STATEMENT OF
SENATOR JAMES A. McCLURE
ON THE INTRODUCTION OF THE
HYDROELECTRIC FAIRNESS ACT OF 1989

Mr. President, along with Senators Johnston, Garn, Nickles, Bradley and Murkowski, I am today introducing the "Hydroelectric Fairness Act of 1989." The purpose of this legislation is to prohibit third parties from misusing the Federal hydroelectric licensing system to obtain a license for non-jurisdictional, pre-1935 unlicensed hydroelectric projects owned by others -- "claim jumping" in other words.

There are about 350 of these projects now at risk; they are owned by electric utilities, municipalities, irrigation districts, private industry and others. The loss of a project would have serious economic consequences to its owner and the consumers of the project's low-cost electricity.

These projects are at risk because they don't have the protection of a Federal license; and they don't have a license because in 1935 Congress "grandfathered" them from Federal jurisdiction.

In 1935, Congress modified the Federal hydroelectric licensing system by enacting the Federal Power Act ("FPA"). The FPA requires only "new" (i.e., post-1935) hydroelectric projects to obtain a license. Pre-1935 projects located on non-navigable rivers were "grandfathered" from Federal jurisdiction and the requirement to obtain a license, as long as no "new" construction takes place. If new construction other than normal maintenance and repair does occur, Federal jurisdiction does apply to the facility and a Federal license must be obtained.

Unfortunately, by relieving pre-1935 projects from the requirement to obtain a license, Congress inadvertently enabled third parties to use the FPA to claim jump them. This can happen in two different ways.

First, a claim jumper could seek a license for the pre-1935 project by proposing "new" construction on it, for example increasing the height of the dam. This new construction would make the project jurisdictional, thereby triggering the FPA's licensing requirements (Sec. 23(b)). But because there is nothing in the FPA which requires the license applicant to be the project owner, the license for the project could be granted to a non-owner. If the owner does not want to give up its project that's just too bad; once the claim-jumper has the license, it can use the FPA's power of eminent domain to force the owner to sell out. Obviously, Congress failed to foresee this possible abuse of law, and there is no question that Congress would have forbid it had it been anticipated.

There is a second provision of the FPA (Sec. 4(e)) which can also be used to claim jump an unlicensed project, but in this case the claim jumper doesn't even have to propose any project improvements. This is because section 4(e) has been interpreted by the Federal Energy Regulatory Commission and the Federal courts as allowing the "voluntary" licensing (i.e., at an applicant's request) of an unlicensed project. Again, as with section 23(b), there is nothing in section 4(e) which requires the applicant to be the owner: any person can file to obtain a license -- even you or I could! This possibility was recently noted by a Federal court which observed that:

> ...pre-1935 project owners [are] at risk because volunteer applicants need not be project owners. Thus, the owner of a project not requiring a license may find himself the target of a license application by strangers.
>
> Cooley v. FERC, 843 F.2d 1464, 1470 (D.C. Cir., 1988) Emphasis added.

Again, there is no question that Congress did not intend the FPA to be interpreted in this manner.

One might ask: Why don't the owners of these unlicensed projects just apply for a license? After all, if they had one wouldn't they be protected?

There are several significant reasons why owners are reluctant to seek the protection of a license. First, filing for a license is an invitation for others to file a competing application, which is explicitly encouraged by the Federal Power Act. And there is no guarantee that the owner would ultimately obtain the license which, in the case of an electric utility, would mean significant increases in electricity prices for its customers if they don't win. Second, filing for a license is expensive. It costs several thousands of dollars, and often many hundreds of thousands of dollars, to prepare the documents necessary for a license application. For a smaller project, that cost might make it uneconomic and result in its being shut down. Or the additional costs may be passed on to consumers through higher prices. Third, once licensed the project would be taken out of state regulatory jurisdiction; the Federal government would then dictate how the project is to be operated and maintained, not the state.

The owner of a hydroelectric facility that has been granted a Congressional "grandfather" from licensing should not be forced -- either by the Commission on its own initiative, or as the result of a claim jumping attempt by a third party -- to seek a license merely to protect its rights. That is the opposite of what Congress had in mind when creating the "grandfather."

Despite the existence of these potential misuses of the Federal Power Act for more than five decades, the Federal licensing system wasn't abused. It wasn't, that is, until a sharp operator decided it wanted to "claim jump" a non-jurisdictional, unlicensed project.

This situation involves the Orange and Rockland Utilities, an electric utility which serves thousands of residential, commercial and industrial customers in New York, New Jersey, and Pennsylvania. They own one of these pre-1935 non-jurisdictional, unlicensed hydroelectric projects on which an outsider, Rio Hydroelectric Associates, filed for a license. Orange and Rockland has estimated that if they lose the project, they would have to pay $50 million to Rio Hydro over the next 30 years to purchase the power back from that project. And recall that another Federal law, the Public Utility Regulatory Policies Act of

1978, requires electric utilities to purchase power from "qualifying facilities" at "full avoided cost" -- costs would then simply be passed on to Orange and Rockland's customers through higher electricity prices.

Whether or not Rio Hydro ultimately wins in its efforts to "claim jump" Orange and Rockland's project -- which will turn on the facts of the case and not the application of the law -- what we are seeing is the proverbial "tip of the iceberg." There are literally hundreds of these nonjurisdictional, unlicensed projects scattered throughout the United States. They are located in: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Iowa, Idaho, Illinois, Indiana, Kentucky, Massachusetts, Maryland, Maine, Michigan, Minnesota, North Carolina, Nebraska, New Hampshire, New Jersey, Nevada, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Vermont, Washington, Wisconsin and Puerto Rico. Each and every one of these projects faces the prospect of a "hostile takeover" if Congress does not step in to prevent it.

The Hydroelectric Fairness Act of 1989 would prevent this claim jumping by prohibiting the issuance of an original license for a pre-1935 nonjurisdictional project to any person other than the owner of the project. The Act does so by prohibiting the Commission from issuing an original license for any project works located on nonnavigable waters and on which there has been no construction within the meaning of section 23(b) since August 26, 1935, to any person, State or municipality other than the owner of the project works. This prohibition would apply in the case of a "voluntary" (Sec. 4(e)) license application. The prohibition would also apply in the case of a mandatory (Sec. 23(b)) license application. Current law provides that new construction may not be undertaken at a pre-1935 facility until a Federal license has been issued. By limiting the issuance of such licenses to the owner of the facility, this Act would eliminate the possibility that a non-owner could obtain a license simply by proposing new construction at such facility. Under this legislation, once the project is licensed this prohibition would no longer apply to that project; when the original license expires, the project would face relicensing competition just as would any other licensed project.

This Act would not expand or modify the Commission's licensing jurisdiction under Part I of the Federal Power Act; and it would not require the licensing of a facility where existing law does not so require. By proposing this legislation, I am not intending to speak to the validity of the theory of licensing under section 4(e) of the FPA as articulated by FERC in its Clifton Power Corp. decision; that will ultimately be resolved by the courts. Finally, and most importantly, this amendment would not in any way limit, restrict or affect the Commission's exercise of its duties and obligations under the Federal Power Act to ensure that a license would be in the overall public interest, and would contain necessary and appropriate fish and wildlife protection, mitigation and enhancement.

This legislation would expand the protection against claim jumpers currently enjoyed by owners of licensed projects, to include the unlicensed projects that Congress grandfathered from Federal licensing in 1935. The Federal Power Act prevents claim jumping of licensed projects, and when it is enacted Section 32 will provide the same protection to non-jurisdictional, unlicensed projects.

This legislation is obviously needed, it is without question justified, and it is clearly in the overall public interest. It would prevent the unintended use of Federal law by third parties to unfairly claim jump projects owned by others. Failure to prevent claim jumping would allow serious harm to befall the owners of the projects and the customers they serve. It would not be good public policy to allow that to happen, and Congress should act to prevent it.

Mr. President, it is for these reasons that I am today introducing this legislation, and I am urging the other Members of the Senate to cosponsor this legislation.

Senator **Bradley**. Thank you very much, Senator McClure. Our first witness today will be Kristina Nygaard, Assistant General Counsel of the Federal Energy Regulatory Commission.

Ms. Nygaard, welcome to the subcommittee, and we welcome your statement. Try not to go on and on, but if you can, summarize your statement in 10 minutes, 12 minutes. That would be very helpful.

STATEMENT OF KRISTINA NYGAARD, ASSISTANT GENERAL COUNSEL, HYDROELECTRIC LICENSING, FEDERAL ENERGY REGULATORY COMMISSION, ACCOMPANIED BY MARK ROBINSON, DIRECTOR, DIVISION OF PROJECT COMPLIANCE AND ADMINISTRATION, OFFICE OF HYDROELECTRIC LICENSING

Ms. **Nygaard**. Thank you. Mr. Chairman and members of the subcommittee, I am pleased to be here this afternoon to discuss S. 635, a bill to amend the Federal Power Act by removing the authority of the FERC to license to anyone but the project owner a specific class of existing hydroelectric projects.

My name is Kristina Nygaard, and I am Assistant General Counsel for Hydroelectric Licensing at the Commission. With me today is Mark Robinson, Director of the Division of Project Compliance and Administration in the Commission's Office of Hydroelectric Licensing. Mr. Robinson and I are appearing before you as technical witnesses and do not speak for the members of the Commission.

S. 635 would prohibit the Commission from issuing an original license for any project works located on nonnavigable waters and on which there has been no post-1935 construction other than to the owner of the project works.

The bill provides that only the project owner can obtain a license for the continued operation and maintenance of any existing hydro project located on nonnavigable waters and which has had no new construction since August 26, 1935. These are projects that the Commission is authorized to license, pursuant to section 4(e) of the Act, but these projects are not required to be licensed by section 23(b) of the Act. For convenience, these projects are referred to as 4(e) projects.

S. 635 appears to leave intact the requirements of Section 23(b)(1) of the Act, but licensing is required if the project is located on a navigable water of the United States, if the project is located on public lands or reservations of the United States, or if the project uses the surplus water or water power from a government dam. The bill would, however, remove the Commission's authority to issue a license to anyone but the project owner for an unlicensed project that is located on a nonnavigable water and has no post-1935 construction even if the project is located on public lands or reservations, uses surplus water or water power from a government dam, or affects the navigable capacity of downstream navigable waters. We are not, however, aware that there are any such unlicensed projects out there fitting that definition.

Under section 23(b)(1) of the Act, any post-1935 construction at a hydro project must be authorized by a license. Under current law, a license for new construction can be obtained by the project's owner or by a non-owner applicant. S. 635 would change existing law to provide that only the project owner can undertake post-1935 construction at a 4(e) project. This means that such post-1935 construction, for example, to add available generating capacity or make other improvements at the project, can occur only when the project owner chooses.

The Commission issues licenses for all the project works that form a complete unit of development, which is defined to encompass water conduits, dams, reservoirs, lands and appurtenant structures. S. 635 permits issuance of a license for 4(e) project works only to the owner of the project works. Therefore, it could be argued by some that enactment of S. 635 prevents the Commission from issuing a license to a developer who, for example, proposes to install generating facilities at a pre-1935 dam owned by someone else, even if that dam has never been used to generate power. Or the bill might allow the Commission to license all features of a complete unit of development other than the pre-1935 dam.

The Comission is aware of only one licensing proceeding, Orange and Rockland, where a nonowner is competing with the owner of an operating project. There are also two permit proceedings pending before the Commission where someone is seeking to take over an existing project. But it is less unusual for a nonowner/developer to file an application to take over for hydro purposes another entity's dam even if that dam is not currently being used for hydro. We read the introductory remarks by Senator McClure to his bill to not seek to encompass non-hydro facilities. However, we would welcome further clarification on this point.

S. 635 would prohibit the Commission from issuing an original license other than to the owner for the category of projects we are discussing. Since the bill does not prohibit relicenses, then where a project owner has voluntarily obtained a license for his 4(e) project on relicensing, competition by nonowners would be allowed.

This concludes my prepared statement, Mr. Chairman. Mark Robinson and I would be happy to answer any questions you may have.

[The prepared statement of Ms. Nygaard follows:]

STATEMENT OF
KRISTINA NYGAARD
ASSISTANT GENERAL COUNSEL FOR HYDROELECTRIC LICENSING
FEDERAL ENERGY REGULATORY COMMISSION
BEFORE THE
SUBCOMMITTEE ON WATER AND POWER
OF THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

MAY 18, 1989

Mr. Chairman and members of the Subcommittee, I am pleased to be here this morning to discuss S. 635, a bill to amend the Federal Power Act by removing the authority of the Federal Energy Regulatory Commission to license a specific class of existing hydroelectric projects.

My name is Kristina Nygaard, and I am Assistant General Counsel for Hydroelectric Licensing at the Commission. With me today is Mark Robinson, Director of the Division of Project Compliance and Administration in the Commission's Office of Hydropower Licensing. Mr. Robinson and I are appearing before you as technical witnesses and do not speak for the members of the Commission.

S. 635 would prohibit the Commission from issuing an original license for any project works located on nonnavigable waters and on which there has been no construction within the meaning of Section 23(b) of the Federal Power Act since August 26, 1935, to any person, State, or municipality other than the owner of the project works.

The bill provides that only the project owner can obtain a license for the continued operation and maintenance of any existing hydroelectric project located on nonnavigable waters and which has had no new construction since August 26, 1935. (Post-1935 construction within the meaning of Section 23(b)(1) refers to work which would substantially enlarge or change an existing project; see Aquenergy Systems, Inc. v. FERC, 857 F.2d 227 (4th Cir. 1988).) These are projects that the Commission is authorized to license pursuant to Section 4(e) of the Act, but that are not required to be licensed by Section 23(b) of the Act. For convenience, these projects are sometimes referred to as "4(e) projects."

That the Commission's authority to license projects is somewhat broader than its authority to require licensing was recently affirmed by the United States Court of Appeals in Cooley v. FERC, 843 F.2d 1464, cert. denied, 57 U.S.L.W. 3313 (Oct. 31, 1988).

S. 635 appears to leave intact the requirement of Section 23(b)(1) of the Federal Power Act that (assuming there is no valid federal pre-1920 permit) licensing is required if the project is located on a navigable water of the United States; if the project is located on public lands or reservations of the United States; or if the project uses the surplus water or water power from a Government dam. S. 635 would however remove the Commission's authority to issue a license to anyone but the project owner for a project that is located on a nonnavigable water and has no post-1935 construction, even if the project is located on public lands or reservations of the United States, uses surplus water or water power from a Government dam, or affects the navigable capacity of downstream navigable waters.

Under Section 23(b)(1) of the Act, any post-1935 construction at a hydroelectric project (assuming the project will affect interstate commerce) must be authorized by a license. Under current law, a license for new construction can be obtained by the project owner or by a non-owner applicant. S. 635 would change existing law to provide that only the project owner can undertake post-1935 construction at a 4(e) project. This means that post-1935 construction, for example to add available generating capacity or make other improvements at the project site, can occur only when and as the project owner chooses.

The Commission issues licenses for all the project works that form a complete unit of development, which is defined by Section 3(11) of the Federal Power Act to encompass water conduits, dams, reservoirs, lands, and appurtenant structures. S. 635 permits issuance of a license for 4(e) "project works" only to the owner of the project works. Therefore, enactment of S. 635 may prevent the Commission from issuing a license to a developer who, for example, proposes to install generating facilities at a pre-1935 dam owned by someone else, even if the dam has never been used to generate power. Alternatively, S. 635 might allow the Commission to license all the features of the complete unit of development other than the pre-1935 dam. Whereas the Commission is aware of only one proceeding where a non-owner is competing with the owner of an operating project for a license for the project, it is less unusual for a non-owner developer to file an application to take over another entity's dam, that is not currently being so used, for hydropower purposes. Clarification on this point would therefore be useful.

S. 635 would prohibit the Commission from issuing an original license, other than to the owner, for the category of projects in question. Since the bill does not prohibit new licenses (relicenses), then it appears that, where a project owner has voluntarily obtained a license for his 4(e) project, on relicensing competition by non-owners would be allowed.

This concludes my prepared statement, Mr. Chairman. Mark Robinson and I would be happy to answer any questions which you may have.

Senator **Bradley**. Thank you very much, Ms. Nygaard. Does it not stretch the imagination a little bit to believe that on the one hand Congress created a category of projects that is not required to be licensed, but on the other hand, intended these projects to be subject to competition without saying so explicitly?

Ms. **Nygaard**. I am sorry, what was the question?

Senator **Bradley**. The question was, to put it another way, I mean, does not the possibility of competition run so contrary to the notion that a project is not required to be licensed that a reasonable person would have mentioned that possibility if it were intended?

Ms. **Nygaard**. It is fair to say that when the Commission finally after all these years had occasion to examine this little nuance of the statute, we did not find any indication in the legislative history that competition was even thought about.

Senator **Bradley**. So that the legislative history itself envisioned no competition?

Ms. **Nygaard**. I would say that we could not find any evidence one way or the other.

Senator **Bradley**. Well, in the absence of any information, it is reasonable to conclude that no competition was envisioned, as you have stated.

You mentioned the fact that the additional generating capacity to a nonjurisdictional project is prevented by S. 635, unless the project owner applies for a license.

Now, my question is are you aware of nonjurisdictional projects which have significant undeveloped hydroelectric capacity?

Ms. **Nygaard**. We are aware of the projects that are unlicensed. Until we examine them more closely, we do not know a lot about them. And one of the things we do not know is which of them has substantial excess capacity.

Senator **Bradley**. So the answer is no, you do not know?

Ms. **Nygaard**. That is correct.

Senator **Bradley**. You are aware that many pre-1935 nonjurisdictional projects are really pretty small?

Mr. **Robinson**. That is correct, sir.

Senator **Bradley**. And the question is, given this fact and the relatively high cost of going through the licensing process, could not competitive licensing render the cost of power from these projects uneconomical?

Mr. **Robinson**. That has happened, Senator. That is correct.

Senator **Bradley**. Could you detail for the committee where that has happened?

Mr. **Robinson**. I would have to provide that.

Senator **Bradley**. Would you do that for the record because I think this is a not insignificant point?

[The information follows:]

The Commission's Office of Hydropower Licensing has issued 63 orders asserting jurisdiction. Of this number, one owner has shut down his operation, complaining of the cost and the procedure required for licensing. Attached is a copy of the Commission's August 16, 1988 Order on Appeal Permitting Withdrawal of Application, which provides background information on this project.

[¶ 61,251]

Charwill Realty, Project No. 10547-001

Order on Appeal Permitting Withdrawal of Application

(Issued August 16, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon and Charles A. Trabandt.

By order issued July 9, 1987, in Docket No. UL87-18,[1] the Director, Office of Hydropower Licensing (Director), found that the constructed Badger Pond Project, located on the Tioga River in Belknap County, New Hampshire, and owned and operated by Charwill Realty (Charwill), was subject to the Commission's mandatory licensing jurisdiction under Section 23(b)(1) of the Federal Power Act (FPA),[2] and ordered Charwill to file an application for license for the project within six months from the date of the order and, within 45 days from the date of the order, a schedule for the preparation of an emergency action plan for the project pursuant to 18 C.F.R. Part 12 (1987). Charwill did not appeal the Director's July 9, 1987 order.

On February 24, 1988,[3] Charwill filed an application for license for the Badger Pond Project No. 10547, consisting of an existing 16-foot-high and 225-foot-long dam, a reservoir with a surface area of 20 acres, and a generating unit having a rated capacity of 75 kW. On June 13, 1988, Charwill filed a request to withdraw its application, stating that the length and expense of the licensing procedure outweighed the economic benefits of producing electricity at the project site. Charwill further stated that it had ceased operation of the power plant at the Badger Pond site and no longer intended to generate power at the site for sale to any public utility.

On June 28, 1988, the Director issued an order[4] disallowing the automatic grant of withdrawal of Charwill's license application for Project No. 10547[5] in order to give the Commission more time to review the request. On July 18, 1988, Charwill filed a timely appeal of the Director's June 28, 1988 order, reiterating the arguments made in its June 13, 1988 withdrawal request and stating that the existing dam would be maintained in accordance with the safety requirements of the State of New Hampshire.

We believe that the Director correctly suspended the automatic withdrawal of the license application to determine whether any outstanding issues remained with respect to the project. However, since Charwill states that the project is no longer generating electricity and that it has no intention of resuming generation at the site, Charwill is no longer required by Section 23(b)(1) of the FPA to obtain a Commission license for the project. Also, since the State of New Hampshire will be monitoring the safety of the project, there is no need to impose any conditions on Charwill's cessation of generation at the site. Accordingly, we will grant Charwill's appeal and its request to withdraw its application for Project No. 10547. However, should Charwill decide in the future to resume hydroelectric generation at the project site, it must first obtain a Commission license to do so.

---

[1] *See* 40 FERC ¶ 62,014 (1987).

[2] 16 U.S.C. §817(1). Pursuant to that section, a hydroelectric project located on non-navigable waters over which Congress has jurisdiction under its authority to regulate interstate and foreign commerce, such as the Tioga River, must be licensed by the Commission if the project affects interstate or foreign commerce and there has been project construction or modifications other than routine maintenance after 1935. Since the Badger Pond Project was constructed after 1935, and since it affected interstate commerce due to the fact that all project power was sold to Public Service Company of New Hampshire, which is interconnected with other utilities outside the state, the project was required to be licensed.

[3] On September 18, 1986, prior to the Director's order finding that the project required licensing, Charwill filed an application for exemption from licensing for the Badger Pond Project No. 10088. On November 17, 1986, the Director rejected that application because it patently failed to conform to the requirements of the Commission's regulations.

On December 24, 1986, Charwill filed an application for license for the Badger Pond Project No. 10209. On March 6, 1987, the Director sent a letter to Charwill requesting that it correct a number of deficiencies in its application within 90 days. Charwill did not respond to that letter, and, on June 29, 1987, the Director rejected Charwill's application for its failure to respond to the deficiency letter.

[4] *See* 43 FERC ¶ 62,378 (1988).

[5] Pursuant to Rule 216 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.216 (1987), the withdrawal of any pleading is effective at the end of 15 days from the date the notice of withdrawal is filed unless, within the 15-day period, a motion in opposition is filed or the decisional authority disallows the withdrawal.

The Commission orders:

Charwill Realty's July 18, 1988 appeal in this proceeding is granted, and its request to withdraw its license application for the Badger Pond Project No. 10547 is granted, effective on the date this order is issued.

Senator **Bradley**. And finally, Ms. Nygaard, do you believe that it makes good policy for a third party to be able to, on the one hand, acquire an unlicensed project, which is carried on a utilities books at depreciated cost, and then, on the other hand, be able to sell the power from the project back to the utility at avoided cost rates under PURPA?

Ms. **Nygaard**. Let me respond this way. The Commission has stated in its Clifton order that it is not at all clear to the Commission that there is any public interest benefit in simply transferring an existing operating project from one owner to another with no benefits to the public.

Senator **Bradley**. So public benefits have to take precedence?

Ms. **Nygaard**. Absolutely. The Commission would have to weigh all those factors.

Senator **Bradley**. Now, could you tell me one more time what is your position on the bill?

Ms. **Nygaard**. I myself have not taken a position on the bill. I am just a technical witness.

Senator **Bradley**. Well, you had a chance.

Senator Burns.

Senator **Burns**. Mr. Chairman, I would yield to Mr. McClure; he has some questions over here that I think are appropriate.

Senator **Bradley**. Senator McClure.

Senator **McClure**. Thank you very much, Mr. Chairman. Ms. Nygaard, before I ask a question let me publicly state what I have had occasion to state in a letter, and that is to publicly express my appreciation of Mr. Robinson for the recent activity in Idaho, which was very helpful. You and Ron Corso were very professional and very helpful in the actions that were taken there. And I wanted to take the opportunity to express publicly what I did in a letter earlier this month.

Mr. **Robinson**. Thank you, Senator.

Senator **McClure**. Surely. How many pre-1935 unlicensed projects are there?

Mr. **Robinson**. We have records of about 235 projects that are operating now that were constructed prior to 1935.

Senator **McClure**. Where are they located?

Mr. **Robinson**. Across the country, Senator.

Senator **McClure**. I have the figure of in 35 States and Puerto Rico. Is that——

Mr. **Robinson**. That is very reasonable.

Senator **McClure**. Am I not correct that these unlicensed pre-1935, nonjurisdictional projects are today at risk to being claim jumped because they do not have the protection of a Federal license, and they do not have a Federal license because the 1935 Congress grandfathered them from Federal jurisdiction and the requirement to be licensed?

Ms. **Nygaard**. Yes, Senator, they are subject to license application by nonowners.

Senator **McClure**. There are some who believe or perhaps fear that FERC has some authority to "require owners of pre-1935 nonjurisdictional projects to voluntarily apply for a license." Are you of the opinion that the Commission has any authority to compel an owner of a pre-1935 nonjurisdictional project to voluntarily obtain a license?

Ms. **Nygaard**. The Commission has no authority to compel licensing of a 4(e) project.

Senator **McClure**. Are you of the legal opinion that the Commission has the authority under section 4(e) of the Federal Power Act to issue a license on a pre-1935 nonjurisdictional project to a nonowner who voluntarily applies for one?

Ms. **Nygaard**. It has such authority, assuming, of course, that 10(a) is met.

Senator **McClure**. Are you of the legal opinion that the Commission has the authority under section 23(b) of the Federal Power Act to issue a license on a pre-1935 nonjurisdictional project to a nonowner who proposes post-1935 construction within the meaning of section 23(b)?

Ms. **Nygaard**. It has such authority.

Senator **McClure**. How many license or preliminary permit applications are today before the Commission which have been filed by so-called claim jumpers?

Ms. **Nygaard**. We have one license proceeding and two permit proceedings that fit that category.

Senator **McClure**. Am I not correct, generally speaking, that S. 635 would give to unlicensed pre-1935 nonjurisdictional projects the same protection against claim jumpers as is currently enjoyed by owners of licensed projects?

Ms. **Nygaard**. Yes, that is how I read the bill.

Senator **McClure**. Under this bill, is it not correct that once the project is licensed, the limitation that only the project owner could obtain the license would no longer apply to that project? That when the original license expires, the project would face re-licensing competition just as would any other licensed project?

Ms. **Nygaard**. I think the bill so provides.

Senator **McClure**. Am I not correct that this bill would neither expand nor contract the Commission's licensing jurisdiction under Part I of the Federal Power Act? It is only a limitation on who may obtain a license for these projects.

Ms. **Nygaard**. I agree.

Senator **McClure**. Is it also not correct that this bill would not limit, restrict or affect the Commission's exercise of its duties and obligations under the Federal Power Act to ensure that any license issued would be in the overall public interest and that the license would contain necessary and appropriate fish and wildlife protection, litigation and enhancement measures?

Ms. **Nygaard**. That is correct.

Senator **McClure**. You state on page 3 of your testimony that some clarification of the Act's intent may be necessary. Would you be willing to work with my staff to work out what may be appropriate, so that FERC will have clear guidance on the policy objectives?

Ms. **Nygaard**. I would be happy to.

Senator **McClure**. Chairman, thank you very much. And I have no further questions at this time.

Senator **Bradley**. Thank you very much, Ms. Nygaard, for coming before the committee and sharing your views on this bill.

[Subsequent to the hearing FERC submitted the following responses:]

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

JUN 16 1989

Dear Chairman Bradley:

Enclosed are responses prepared by Commission staff to post-hearing questions which you submitted pursuant to your subcommittee's May 18, 1989, hearing on S. 635, the Hydroelectric Fairness Act of 1989.

I hope that this information is helpful to you.

Sincerely,

Kristina Nygaard
Kristina Nygaard
Assistant General Counsel
Hydroelectric Licensing

Honorable Bill Bradley
Chairman
Subcommittee on Water and Power
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Question 1: Please provide the Committee a list of all non-federal unlicensed hydroelectric projects. Please list these by State, indicating the plant name, the owner, the stream name, the class, the project capacity and the year of original construction.

Answer: TABLE 1 lists all non-federal unlicensed hydroelectric projects (UL) identified by the Commission to date.

TABLE 1

UNLICENSED AND OPERATING HYDROELECTRIC PROJECTS 1/

06/09/1989

* STREAM NAME	PLANT NAME	OWNER	CLASS	STATE	CAPACITY KW	CONST YEAR
***						
* KASNYKU BAY,CHATHAM STRAIT	HIDDEN FALLS	ALASKA DEPT FISH & GAME	M	AK	200	1979
* GOLD CR,GASTINEAU INLET	GOLD CREEK	ALASKA ELEC LT & PWR CO	P	AK	1600	
* WARM SPRINGS BAY	BAHOVEC	BAHOVEC,FRED	I	AK	3	
* SKECKLEY CR	SKECKLEY	BUCHAN & HEINEN PKG CO	I	AK	28	
* BARANOF R,WARM SPRING BAY	BARANOF WARM SPRING	GRUENING,CLARK S	R	AK	14	
* PURPLE LAKE	PURPLE LAKE	METLAKATLA PWR AND LIGHT	M	AK	3900	
* ONE MILE CR	ONE MILE	NEW ENGLAND FISH CO	I	AK	8	
* KODIAK ISLAND	PARKS	PARKS CANNING CO	I	AK	8	
* INDIAN R	COLLEGE	SHELDON-JACKSON JR COLLEGE	M	AK	50	
* BARANOF R	SONNENBURG	SONNENBURG, WALLACE	I	AK	3	
* S CONSOL CNL(SALT R)	S CONSOLIDATED	SALT R PROJ AG IMP P DIST	M	AZ	1400	1980
* SALT R	HORSE MESA	SALT R PROJ AG IMP P DIST	M	AZ	99900	1969
* CROSS CUT CNL(SALT R)	CROSS CUT	SALT R PROJ AG IMP P DIST	M	AZ	3000	
* SALT R	ROOSEVELT	SALT R PROJ AG IMP P DIST	M	AZ	36000	
* SALT R	HORSE MESA	SALT R PROJ AG IMP P DIST	M	AZ	29700	
* SALT R	MORMON FLAT	SALT R PROJ AG IMP P DIST	M	AZ	48600	
* SALT R	MORMON FLAT	SALT R PROJ AG IMP P DIST	M	AZ	9200	
* SALT R	STEWART MOUNTAIN	SALT R PROJ AG IMP P DIST	M	AZ	10400	
* TOOLUMNE R	R KIRKWOOD	HETCH HETCHY WTR & PWR	M	CA	104022	
* HETCH HETCHY AQUEDUCT	MOCCASIN CREEK	HETCH HETCHY WTR & PWR	M	CA	90000	
* CHERRY CR, TOOLUMNE R	D R HOLM	HETCH HETCHY WTR & PWR	M	CA	135000	
* ALL AMER CNL(COLO.R)	DROP 2	IMPERIAL IRRIG DIST	M	CA	10000	
* ALL AMER CNL(COLO.R)	PILOT KNOB	IMPERIAL IRRIG DIST	M	CA	33000	
* ALL AMER CNL(COLO.R)	DROP 4	IMPERIAL IRRIG DIST	M	CA	19600	
* ALL AMER CNL(COLO.R)	DROP 1	IMPERIAL IRRIG DIST	M	CA	5850	
* E HIGHLINE CNL(COLO.R)	EAST HIGHLINE	IMPERIAL IRRIG DIST	M	CA	2415	
* W SIDE M CNL(COL.R)	TURNIP	IMPERIAL IRRIG DIST	M	CA	420	
* ALL AMER CNL(COLO. R)	DROP 5	IMPERIAL IRRIG DIST	M	CA	4000	
* CENTER M CNL(COLO.R)	DOUBLE WEIR	IMPERIAL IRRIG DIST	M	CA	560	
* ALL AMER CNL(COLO.R)	DROP 3	IMPERIAL IRRIG DIST	M	CA	9800	
* LA AQUE (SANTA CLARA R)	SAN FERNANDO	LOS ANGELES DEPT W AND P	M	CA	5600	
* LA AQUE (SANTA CLARA R)	FOOTHILL	LOS ANGELES DEPT W AND P	M	CA	11000	
* LA AQUE (SANTA CLARA R)	S FRANCISQUITO 2	LOS ANGELES DEPT W AND P	M	CA	42000	
* FRANKLIN CANYON, LOS ANGELES	FRANKLIN CANYON	LOS ANGELES DEPT W AND P	M	CA	2000	
* LA AQUE (SANTA CLARA R)	S FRANCISQUITO 1	LOS ANGELES DEPT W AND P	M	CA	64375	
* DIVISION CR, OWENS R	DIVISION CREEK	LOS ANGELES DEPT W AND P	M	CA	600	
* COTTONWOOD CR,OWENS R	COTTONWOOD 3	LOS ANGELES DEPT W AND P	M	CA	1500	
* OWENS R	PLEASANT VALLEY	LOS ANGELES DEPT W AND P	M	CA	3200	

1/ This list does not include unlicensed operating hydropower projects that have pending license or exemption applications. Date of construction is included if known.

* OWENS R	CONTROL GORGE	LOS ANGELES DEPT W AND P	M	CA	37500	
* OWENS R	MIDDLE GORGE	LOS ANGELES DEPT W AND P	M	CA	37500	
* OWENS R	UPPER GORGE	LOS ANGELES DEPT W AND P	M	CA	37500	
* LA AQUE (SANTA CLARA R)	HAIWEE	LOS ANGELES DEPT W AND P	M	CA	5600	
* BIG PINE CR, OWENS R	BIG PINE 3	LOS ANGELES,CITY OF	M	CA	3200	
* MIOCENE CNL(WBR NFK FEATHER R	COAL CANYON	PACIFIC GAS & ELECTRIC CO	P	CA	1000	
* W BR N FK FEATHER R	LIME SADDLE	PACIFIC GAS & ELECTRIC CO	P	CA	2000	
* LYTLE CR, SANTA ANA R	FONTANA	SOUTHERN CALIF EDISON CO	P	CA	2950	
* MILL CR, SANTA ANA R	MILL CREEK 1	SOUTHERN CALIF EDISON CO	P	CA	800	
* SAN ANTONIO CR, WALNUT CR	ONTARIO 2	SOUTHERN CALIF EDISON CO	P	CA	320	
* SAN ANTONIO CR, WALNUT CR	SIERRA	SOUTHERN CALIF EDISON CO	P	CA	480	
* SAN ANTONIO CR, WALNUT CR	ONTARIO 1	SOUTHERN CALIF EDISON CO	P	CA	600	
* TOOLUMNE R	LA GRANGE	TURLOCK IRRIG DIST	M	CA	4000	1909
* SAN JUAN R	PAGOSA SPRINGS	LA PLATA ELEC ASSN INC	C	CO	200	
* ST VRAIN CR,BOULDER CR	LONGMONT	LONGMONT, CITY OF	M	CO	611	
* COLORADO R	SHOSHONE	PUBLIC SERVICE CO OF CO	P	CO	14400	
* COLORADO R	GRND VALLEY(PALISADES	PUBLIC SERVICE CO OF CO	P	CO	3000	
* BIG SQUAW CR,RIO GRANDE	SQUAW CREEK	TREGO, ERNEST E	I	CO	8	1948
* YANTIC R	GILMAN	BOZRAH LIGHT AND POWER CO	P	CT	250	1943
* BANTAM R	LITCHFIELD(BANTAM)	CONN LIGHT & POWER CO	P	CT	320	
* WINDSOR LOCKS CNL(CONN R)	WINDSOR LKS(ENFIELD	DEXTER C H AND SONS INC	I	CT	500	
* FARMINGTON R	RAINBOW	FARMINGTON RIVER POWER CO	P	CT	8000	
* SHETUCKET R	OCCUM	NORWICH, CITY OF	M	CT	800	
* BLUE SPRINGS CR,CHIPOLA R	BLUE SPRINGS(MARIANN	FLORIDA PUB UTILITIES CO	P	FL	168	
* ESTATOAH CR,TENNESSEE R	ESTATOAH	GEORGIA POWER CO	P	GA	240	
* OCONEE R	BARNETT SHOALS	GEORGIA POWER CO	P	GA	2800	
* SOGUE R	HABERSHAM	HABERSHAM MILLS	I	GA	1660	
* SOUTH R	SNAPPING SHOALS	THOMAS INDUSTRIES	I	GA	200	
* ETOWAH R	CARTERSVILLE	THOMPSON WEINMAN CO	I	GA	625	
* WAILUKU R	WAIAU	HAWAII ELECTRIC LIGHT CO	P	HI	1100	
* WAILUKU R	PUUEO	HAWAII ELECTRIC LIGHT CO	P	HI	2250	
* WAILOA DITCH	KAHEKA	HAWAIIAN COM & SUG CO	I	HI	4002	
* WAILOA DITCH	PAIA	HAWAIIAN COM & SUG CO	I	HI	800	
* LOWER HAMAKUA DITCH	HONOKAA	HONOKAA SUGAR CO	I	HI	800	
* KOHOANA R	WAIAWA	KEKAHA SUGAR CO LTD	I	HI	500	
* WAIMEA R	WAIMEA	KEKAHA SUGAR CO LTD	I	HI	1000	
* KOHALA DITCH	HAWI	KOHALA SUGAR CO	I	HI	350	
* S FK WAILUA R	LOWER LIHUE	LIHUE PLANTATION CO	I	HI	800	
* WAIHAI R,S FK WAILUA R	UPPER LIHUE	LIHUE PLANTATION CO	I	HI	500	
* KALAHEO R	KALAHEO	MCBRYDE SUGAR CO LTD	I	HI	1000	
* MAKAWELI R	HYDRO (KAUMAKANI)	OLOKELE SUGAR CO LTD	I	HI	500	
* WAINIHA R	WAINIHA	PIONEER MILL CO LTD	I	HI	3600	
* KAUAULA STREAM	KAUAULA	PIONEER MILL CO LTD	I	HI	450	
* MAQUOKETA R	MAQUOKETA	IOWA ELEC LT AND PWR CO	P	IA	1200	
* MAQUOKETA	LAKEHURST	IE INDUSTRIES	I	IA		
* IOWA R	IOWA FALLS	IOWA ELEC LT AND PWR CO	P	IA	540	
* MISSISSIPPI R	KEOKUK L&D 19	UNION ELECTRIC CO	P	IA	124800	1911
* CEDAR R	WAVERLY (EAST HYDRO)	WAVERLY, CITY OF	M	IA	495	
* BEAR CR,S FK PAYETTE R	CLIFFORD ROSENBALM	ELLIS,WAYNE R	I	ID	8	
* BLUE MOON CR,SULPHUR CR,M FK	BLUE MOON CR SALMON	HORNBACK,MARVIN E	I	ID	30	
* SNAKE R(OFFSTREAM)	CLEAR LAKE	IDAHO POWER CO	P	ID	2500	

* ELKHORN CREEK	ELKHORN CREEK	JERALD KOOYERS	P	ID		
* SNAKE R	THOUSAND SPRINGS	IDAHO POWER CO	P	ID	8800	
* SODA CR,BEAR R	SODA SPRINGS	SODA SPRINGS, CITY OF	M	ID	100	
* SODA CR,BEAR R	SODA SPRINGS 1	SODA SPRINGS, CITY OF	M	ID	200	
* SODA CR,BEAR R	SODA SPRINGS 4	SODA SPRINGS, CITY OF	M	ID	300	
* ILLINOIS R	MARSEILLES	ILLINOIS POWER CO	P	IL	2024	
* SYLVAN SLOUGH, MISS R	MOLINE L&D 15	IOWA ILL G & E CO	P	IL	3600	
* ST JOSEPH R	ST JOE DAM	FT WAYNE, CITY OF	M	IN	100	
* TIPPECANOE R	OAKDALE	NORTHERN IND PUB SERV CO	P	IN	11000	
* TIPPECANOE R	NORWAY	NORTHERN IND PUB SERV CO	P	IN	7200	
* FAWN RIVER	STAR MILLS	DAVID ZINKIE	R	IN		
* FAWN R	GREENFIELD MILLS	RINKEL H G & SONS	I	IN	152	
* DIX R	DIX	KENTUCKY UTILITIES CO	P	KY	28257	
* RAZINA	RAZINA	RAZINA	M	LA		
* HOLYOKE CNL(CONN R)	HOLYOKE MILLS	BROWN CO	I	MA	3110	
* CONN CNL(CONN R)	TURNERS FALLS	ESLEECK MANUFACTURING CO	I	MA	450	
* WACHUSETT RESEVOIR	COSGROVE	METRO DISTRICT COMM.	M	MA	4000	
* QUABBIN RESERVOIR(SWIFT R)	OAKDALE	METRO DISTRICT COMM.	M	MA		
* HOUSATONIC R	SOUTH LEE	HURLBUT PAPER CO	I	MA	361	
* CHICOPEE	PUTTS BRIDGE	WESTERN MA ELECTRIC	P	MA		
* N NASHUA R	FITCHBURG	JAMES RIVER MASSACHUSETTS	I	MA	250	1924
* CHICOPEE	RED BRIDGE	WESTERN MA ELECTRIC CO	P	MA		
* CHICOPEE	DWIGHT	WESTERN MA ELECTRIC CO	P	MA		
* CHICOPEE	INDIAN ORCHARD	WESTERN MA ELECTRIC CO	P	MA		
* GOOSE CR,HOUSATONIC R	LAKE MAY	LAKE MAY POWER CO	P	MA	700	
* SAWMILL R	MARTIN MACH CO DAM	MARTIN MACHINE CO	I	MA	75	
* SWIFT R	WINDSOR	METRO DIST COMM	M	MA	1200	
* HOLYOKE CNL(CONN R)	HOLYOKE	MIGLIOZZI,LOUIS P	R	MA	350	
* BLACKSTONE R	FARNUMSVILLE	O DONNELL J J WOOLENS	I	MA	112	
* HOLYOKE CNL(CONN R)	HOLYOKE	PARSONS PAPER CO	I	MA	486	
* MILLERS R	ATHOL	STARRETT L S CO	I	MA	112	
* LITTLE R	COBBLE MOUNTAIN	WESTERN MASS ELECTRIC CO	P	MA	33000	
* CHICOPEE R	MUNGERVILLE	WESTERN MASS ELECTRIC CO	P	MA	3200	
* WESTFIELD R	RUSSELL	WESTFIELD RIVER PAPER CO	I	MA	700	
* BEAVERDAM CR,WICOMICO R	PARKER POND	HINMAN,W H	I	MD	40	
* LITTLE FALLS,GUNPOWDER R	GORES MILL	LINTZ,CLARENCE	I	MD	10	
* DEER CR,SUSUEHANNA R	WILSON MILL DAM	WILLIAMS,ANN T	R	MD	23	
* PISCATAQUIS R	DOVER FOXCROFT	AMERICAN WOOLEN CO	I	ME	854	
* LEWISTON CNL(ANDROSCOGGIN R)	ANDROSCOGGIN	BATES MANUFACTURING CO	I	ME	2566	1924
* DAMARISCOTTA LK	DAMARISCOTTA	DAMARISCOTTA MANUF CO	I	ME	400	1907
* ST CROIX R	GRAND FALLS	GEORGIA-PACIFIC CORP	I	ME	9652	
* WILSON CREEK	WILSON POND	CONSOLIDATED HYDRO	P	ME		
* ST CROIX R	WOODLAND	GEORGIA-PACIFIC CORP	I	ME	9000	
* SACO RIVER	SWAN FALLS	LAWRENCE KEDDY	P	ME		
* KENNEBEC R	GREAT NORTHERN PAPER	GREAT NORTHERN NEKOOSA CO	I	ME	6000	
* SANDY RIVER	SANDY RIVER	TOWN OF MADISON	M	ME		
* WILSON POND,SEBEC R	GREENVILLE	GREENVILLE MFG CO	I	ME	576	
* LITTLE ANDROS	MARCAL PAPER	CONSOLIDATED HYDRO	P	ME		
* PENNESEEWASEE RIVER	PENNESEEWASEE	CONSOLIDATED HYDRO	P	ME		
* W BR DEAD R	EUSTIS	KEDDY,LAWRENCE	I	ME	250	
* SEBASTICOOK R	BURNHAM	CONSOLIDATED HYDRO	P	ME		
* LEWISTON CNL(ANDROSCOGGIN R)	LEWISTON(LIBBEY)	LIBBEY W S CO	I	ME	750	

* SANDY R	NORRIDGEWOCK	MADISON,TOWN OF	M	ME	450	
* ANDROSCOGGIN R	WORUMBO(EAST)	MAX MILLER & CO INC	I	ME	900	1920
* ST CROIX R	MILLTOWN	NEW BRUNSWICK ELEC POWER	P	ME	3036	
* ANDROSCOGGIN R	CABOT MFG CO DAM	PEJEPSCOT PAPER/HEARST CO	I	ME	12000	
* GREAT WORKS STR,PENOBSCOT R	GREAT WORKS	PENOBSCOT CHEMICAL	I	ME	4680	
* SACO R	SACO REALTY DAM	SACO REALTY CO	I	ME	790	
* OSSIPEE R	KEZAR FALLS LOWER	SMITH,L E & V P	R	ME	500	
* OSSIPEE R	KEZAR FALLS UPPER	SMITH,L E & V P	R	ME	340	
* SALMON FALLS R	SOUTH BERWICK	SOUTH BERWICK MANUF CO	I	ME	1200	
* MOUSAM R	OLD FALLS	YORK CORP	I	ME	400	1890
* MOUSAM R	NEW DAM (ESTES LAKE)	YORK CORP	I	ME	300	
* AU TRAIN R	AU TRAIN	CLEVELAND CLIFFS IRON CO	I	MI	896	
* ESCANABA R	ESCANABA 2	CLEVELAND CLIFFS IRON CO	I	MI	2000	
* DEAD R	MC CLURE	CLIFFS ELECTRIC SERVICE CO	I	MI	8000	
* DEAD R	HOIST	CLIFFS ELECTRIC SERVICE CO	I	MI	4400	1916
* PAINT R	CRYSTAL FALLS	CRYSTAL FALLS,CITY OF	M	MI	1000	
* ST MARYS R	EDISON(SAULT)	EDISON SAULT ELEC CO	P	MI	43700	
* GRAND R	MIX	GRAND RIVER PWR CO INC	R	MI	202	
* GRAND R	SMITHVILLE	GRAND RIVER PWR CO INC	R	MI	500	
* ST JOSEPH R	BERRIEN SPRINGS	IN AND MI ELEC CO	P	MI	7200	
* MANISTIQUE R	PAPER MILL	MANISTIQUE PULP & PAPER CO	I	MI	4250	
* THORNAPPLE R	IRVING	MIDSTATE SERVICE CO	P	MI	600	
* DOWAGIAC CR,ST JOSEPH R	NILES	NILES, CITY OF	M	MI	460	
* PINE R	ST LOUIS	ST LOUIS, CITY OF	M	MI	400	
* KALAMAZOO R	ALLEGAN CITY DAM	IMPERIAL CARVING CO	I	MI		
* TITTABAWASEE RIVER	EDENVILLE	WOLVERINE POWER CO	P	MI		
* BOARDMAN R	ELK RAPIDS(KEYSTONE)	TRAVERSE CITY,CITY OF	M	MI	750	
* ST JOSEPH RIVER	KINGS MILL	ESTON RAWSON	R	MI		
* S BR ROOT R	LANESBORO HY	LANESBORO, CITY OF	M	MN	477	
* PAW PAW RIVER	PAW PAW	VILLAGE OF PAW PAW	M	MI	250	
* BLACK RIVER	KLEBER	WOLVERINE POWER SUPPLY INC	I	MI	1200	
* TITTABAWASEE RIVER	SECORD	WOLVERINE POWER CORP	P	MI		
* TITTABAWASEE RIVER	SMALLWOOD	WOLVERINE POWER CORP	P	MI		
* TITTABAWASEE RIVER	THREE RIVERS	SHEFFIELD CAR CO	I	MI		
* RAISIN RIVER	SHARON MILLS	SHARON MILLS ANTIQUES	P	MI	150	
* FAWN RIVER	FAWN RIVER	JUDY DISNEY	R	MI		
* PRAIRIE CREEK	STERNER	KEITH STERNER	P	MI	12	
* THORNAPPLE	MIDDLEVILLE	MIDSTATE SERVICE CO	I	MI		
* PIGEON RIVER	LANSING CLUB	GOLDEN LOTUS INC	P	MI	150	
* ESCANABA	CATARACT	UPPER PENINSULA POWER CO	P	MI		
* OTTER TAIL R	HOOT LAKE	OTTER TAIL POWER CO	P	MN	1000	1914
* OTTER TAIL R	TAPLIN GORGE	OTTER TAIL POWER CO	P	MN	560	
* OTTER TAIL R	WRIGHT	OTTER TAIL POWER CO	P	MN	400	
* OTTER TAIL R	PISGAH	OTTER TAIL POWER CO	P	MN	520	
* MISSISSIPPI R	BEMIDJI	OTTER TAIL POWER CO	P	MN	740	1905
* OTTER TAIL R	DAYTON HOLLOW	OTTER TAIL POWER CO	P	MN	970	
* REDWOOD R	REDWOOD FALLS	REDWOOD FALLS,CITY OF	M	MN	500	
* ZUMBRO R	ROCHESTER	ROCHESTER, CITY OF	M	MN	2680	
* RED LAKE R	THIEF RIVER FALLS	THIEF R FALLS,CITY OF	M	MN	550	
* FINLEY CREEK	FINLEY CREEK	EMPIRE DISTRICT ELECTRIC	P	MO	70	
* SECOND BROAD R	CLIFFSIDE	CONE MILLS CORP	I	NC	1625	

* DEEP RIVER	RAMSEUR MILL	J & T HYDRO CO	P	NC		
* FIRST BROAD R	STICE SHOALS	DUKE POWER CO	P	NC	600	
* DEEP RIVER	COLTRAIN MILL	COOK INDUSTRIES	I	NC	90	
* GREEN R	TURNER SHOALS	DUKE POWER CO	P	NC	5500	
* GREEN R	TUXEDO (LAKE SUMMIT)	DUKE POWER CO	P	NC	5000	
* MIDDLE FK MUDDY CR	MIDDLE FORK	NEW R LT & PWR CO	P	NC	180	
* LOWER LITTLE R	MILLERSVILLE	RHODES WHITNER MILLS	I	NC	320	
* TAR R	ROCKY MOUNT	ROCKY MOUNT MILLS	I	NC	1600	
* ROCKY R	ROCKY RIVER	WOODY T C	P	NC	160	
* FRENCHMAN CR,REPUBLICAN R	IMPERIAL	IMPERIAL, CITY OF	M	NE	100	
* BIG BLUE R	BLUE SPRINGS 2	NEBRASKA PUB PWR DIST	M	NE	418	
* MINNECHADUZA CR,NIOBRARA R	MINNECHADUZA	NEBRASKA PUB PWR DIST	M	NE	200	
* NIOBRARA R	FORT NIOBRARA	NEBRASKA PUB PWR DIST	M	NE	300	
* PLATTE R	KEARNEY	NEBRASKA PUB PWR DIST	M	NE	1500	
* NIOBRARA R	SPENCER 5/	NEBRASKA PUB PWR DIST	M	NE	2400	
* BIG BLUE R	BARNESTON	NORRIS PPD/NE MUN P P	M	NE	800	
* CEDAR R	SPALDING	SPALDING,CITY OF	M	NE	140	
* BIG BLUE R	WILBER	WILBER HYDRO ELEC PLANT	P	NE	260	
* SUGAR R	CLAREMONT	CLAREMONT PAPER CO INC	I	NH	800	1921
* SUGAR R	CLAREMONT WEST	COY PAPER CO	I	NH	500	
* ELLIS R	GOODRICH FALLS	GOODRICH FALLS HYDRO ELEC CO	P	NH	650	
* NEWFOUND R	IPC NO 1	INTERNATIONAL PACKING CORP	I	NH	168	
* NEWFOUND R	IPC NO 2	INTERNATIONAL PACKING CORP	I	NH	150	
* AMMONOOSUC	ANTHORP	WHITE MOUNTAIN HYDRO	M	NH		
* NUBANUSIT BROOK	FILTRINE MIDDLE	FILTRINE MANUFACTURING CO	I	NH		
* COHAS BK,MERRIMACK R	LOW STATION	MANCHESTER, CITY OF	M	NH	375	
* SALMON FALLS R	ROWE	MILLENIUM PWR INC	R	NH	60	
* CONTOOCOOK R	MILL WHEEL	MONADNOCK MILLS INC	I	NH	750	
* CONTOOCOOK R	PIERCE STATION	MONADNOCK MILLS INC	I	NH	720	
* W BR CONTOOCOOK R	JACKMAN	PUBLIC SERVICE CO OF NH	P	NH	3200	
* CONNECTICUT R	RYEGATE	RYEGATE PAPER CO	I	NH	1860	
* SALMON FALLS R	MILTON W ROCHESTER	SPAULDING FIBER CO INC	I	NH	312	
* COCHECO R	HATFIELD	WYANDOTTE HYDRO ASSOC	R	NH	235	1983
* COCHECO R	ROCHESTER	WYANDOTTE WORSTED CO	I	NH	100	
* MUSCONETCONG R	WARREN GLEN	RIEGEL PAPER CORP	I	NJ	720	
* MUSCONETCONG R	HUGHESVILLE	RIEGEL PAPER CORP	I	NJ	444	
* CARSON R	LAHONTAN	SIERRA PACIFIC POWER CO	P	NV	2400	
* CARSON R	26 FOOT DROP	SIERRA PACIFIC POWER CO	P	NV	800	
* FISHKILL CR,HUDSON R	BEACON	BRAENDLY DYE WORKS INC	I	NY	100	
* NEVERSINK DIV	NEVERSINK	CENT HUDSON G & EL CORP	P	NY	25000	1953
* WALLKILL R	DASHVILLE	CENT HUDSON G & EL CORP	P	NY	4800	
* WALLKILL R	STURGEON POOL	CENT HUDSON G & EL CORP	P	NY	14400	
* POULTNEY R	CARV"RS FALLS	CENTRAL VT PUB SERV CORP	P	NY	1600	1922
* BLACK R	CARTHAGE PAPER MAKER	CLIMAX MANUFACTURING CO	I	NY	800	
* E CANADA CR	DOLGEVILLE	DOLGEVILLE, VILLAGE OF	M	NY	320	
* GENESEE R	KODAK PARK	EASTMAN KODAK CO	I	NY	300	
* SARANAC R	PLATTSBURG 1	GEORGIA-PACIFIC CORP	I	NY	2400	
* SARANAC R	PLATTSBURG 2	GEORGIA-PACIFIC CORP	I	NY	850	
* SARANAC R	TREADWELL MILLS	GEORGIA-PACIFIC CORP ET AL	I	NY	2400	
* SARANAC R	PLATTSBURG	IMPERIAL PAPER CO	I	NY	600	
* ESOPUS CR,HUDSON R	SAUGERTIES	MARTIN CANTINE CO	I	NY	25000	

* WISCOY CREEK	MILLS MILLS #172	ROCHESTER GAS & ELECTRIC	P	NY		
* INDIAN RIVER	CEDAR RIVER	INDIAN LAKE POWER & LIGHT	P	NY		
* ST. REGIS RIVER	ALLENS FALLS	NIAGARA MOHAWK POWER CORP	P	NY		
* ST. REGIS RIVER	PARISHVILLE	NIAGARA MOHAWK POWER CORP	P	NY		
* HUDSON R	SCHUYLERVILLE	NIAGARA MOHAWK POWER CORP	P	NY		
* MONGAUP	RIO	ORANGE & ROCKLAND UTILS	P	NY		
* W CANADA CR	LITTLE FALLS	NIAGARA MOHAWK PWR CORP	P	NY	150	
* SALMON R	LIGHTHOUSE HILL	NIAGARA MOHAWK PWR CORP	P	NY	7500	
* SALMON R	BENNETTS BRIDGE	NIAGARA MOHAWK PWR CORP	P	NY	26750	
* RONDOUT AQUE (RONDOUT CR)	GRAHAMSVILLE	ORANGE & ROCKLAND UTILS	P	NY	18000	
* WISCOY CR,GENESEE R	WISCOY 170	ROCHESTER GAS & ELEC CORP	P	NY	1080	
* WISCOY CR,GENESEE R	MT MORRIS 172	ROCHESTER GAS & ELEC CORP	P	NY	222	
* CATTARAUGUS CR,LAKE ERIE	CATTARAUGUS CREEK	SPRINGVILLE,VILLAGE OF	M	NY	600	
* POWDER R	BAKER	BAKER, CITY OF	M	OR	200	
* DITCH CR, HOOD R	REED ROAD	FARMERS IRRIG DIST	M	OR	160	1981
* BREITENBUSH R	BREITENBUSH	KENNEDY, E C	I	OR	10	
* WILLAMETTE R	LAKE OSWEGO	LAKE OSWEGO CORP	R	OR	400	
* WILLAMETTE R	ALBANY	PACIFIC POWER & LIGHT CO	P	OR	800	
* DESCHUTES R	CLINE FALLS	PACIFIC POWER & LIGHT CO	P	OR	1000	
* N SANTIAM R	STAYTON	PACIFIC POWER & LIGHT CO	P	OR	600	
* L BUTTE CR,ROGUE R	EAGLE POINT	PACIFIC POWER & LIGHT CO	P	OR	2813	
* N SANTIAM R	MARION INVESTMENT	SANTIAM WATER CONTROL DIST	M	OR	900	
* SANTIAM	BERLIN	ALEX BERLIN	R	OR		
* PACIFIC OCEAN	TENMILE CREEK	RADTKE, HANS	R	OR		
* MINIKAHDA CREEK	MINIKAHDA	MINIKAHDA POWER COMPANY	P	OR		
* NORTH SANTIAM RIVER	FERY	FERY, FRED	R	OR		
* WILLIAMS, EAST FORK	ROCK CREEK	WEBB, RICHARD G. AND GRACE M.	R	OR		
* MCKENZIE	MCKENZIE	JOHN BIGELOW	R	OR		
* CANYON CREEK	CANYON CREEK	COSGROVE, MICHAEL	R	OR		
* OLLALA CREEK	CROY	CROY, DOUGLAS	R	OR		
* FARMINGTON	RAINBOW	FARMINGTON RIVER PWR CO	M	OR		
* WILLIAMETTE	HIEBERT	HIEBERT, HENRY	R	OR		
* ROGUE	HAMILTON	HAMILTON, JAMES W.	R	OR		
* PLEASANT CREEK	DITCH CREEK	WAGNER, DELMER	R	OR		
* COLUMBIA	DIXON	DIXON, WILLIAM C. AND PAMELA	R	OR		
* SANDY	PIT RUN	PIT RUN INC.	R	OR		
* UMPQUA, S.	DAVIS	DAVIS, WILLIAM C.	R	OR		
* CLACKAMAS	EAGLE	U.S. FISH AND WILDLIFE	F	OR		
* MOLLALA	KARCH	KARCH, HOWARD L.	R	OR		
* SIUSLAW	KNOWLES CREEK	SIMMS, MONTY L. & TAMMIE	R	OR		
* MCKENZIE	POWELL	POWELL, RUDY	R	OR		
* THOMAS CREEK	LINDEMANN	LINDEMANN, FRED A.	R	OR		
* WILLAMETTE	MARYS	ROY, THOMAS	R	OR		
* SLATE CREEK	RAMSEY	WITTICH, JOHN	R	OR		
* WALLOWA	SPRING CREEK	WIGGENS, DUANE	R	OR		
* ALTHOUSE CREEK	SUCKER CREEK	MCCASLIN, DOLIN	R	OR		
* HOOD RIVER	SANDERS	SANDERS, JACK R	R	OR		
* ALTHOUSE CREEK	SUCKER CREEK	BERNARD, RUSSELL	R	OR		
* N UMPQUA RIVER	WINCHESTER	WINCHESTER WTR CONTROL DIST	M	OR	1300	1983
* LOYALSOCK CR,W BR SUSQUEHANN	HILLSGROVE	LEWIS T C COMPANY	I	PA	100	

* LOYALSOCK CR	LOYALSOCK CREEK	F. ALAN SEVER	R	PA		
* MAHANTANGO CREEK	BLACKSTONE MILL	KECK, T.A. & HOLLY S	R	PA		
* BEAVER R	UNION DRAW	REPUBLIC STEEL CORP	I	PA	100	
* RIO TORO NEGRO	TORO NEGRO 2	PUERTO RICO WTR RES AUTH	M	PR	1900	
* RIO JACAQUAS(TORO NEGRO R)	TORO NEGRO 1	PUERTO RICO WTR RES AUTH	M	PR	4320	
* RIO JORDAN,RIO VIVI	CAONILLAS 2	PUERTO RICO WTR RES AUTH	M	PR	3600	
* RIO GUAYANES(VACAS R)	GARZAS 1	PUERTO RICO WTR RES AUTH	M	PR	7200	
* RIO YAUCO(PRIETO R)	YAUCO II	PUERTO RICO WTR RES AUTH	M	PR	9000	
* RIO GUAYANES(VACAS R)	GARZAS 2	PUERTO RICO WTR RES AUTH	M	PR	5040	
* RIO LOCO(PRIETO R)	YAUCO I	PUERTO RICO WTR RES AUTH	M	PR	25000	
* RIO CAONILLAS	CAONILLAS 1	PUERTO RICO WTR RES AUTH	M	PR	18000	
* RIO GRANDE DE ARECIBO	DOS BOCAS	PUERTO RICO WTR RES AUTH	M	PR	10500	
* N BR PAWTUXET R	PROVIDENCE	PROVIDENCE,CITY OF	M	RI	1500	
* ROCKY R	ROCKY RIVER(ABBEVILL	ABBEVILLE,CITY OF	M	SC	2600	
* HORSE CR	GRANITEVILLE	GRANITEVILLE CO	I	SC	450	
* HORSE CR	VAUCLUSE	GRANITEVILLE CO	I	SC	480	
* BLACK CR	HARTSVILLE	SONOCO PRODUCTS CO	I	SC	318	
* S FK PACOLET R	R B SIMMS(SPARTANBUR	SPARTANBURG,CITY OF	M	SC	1000	
* REEDY RIVER	BOYDS MILL	DUKE POWER COMPANY	P	SC		
* LAWSON FK,PACOLET R	WHITNEY	WHITNEY MILLS	I	SC	200	
* SPEARFISH CR,REDWATER CR	SPEARFISH 2	HOMESTAKE MINING CO	I	SD	4000	
* ENGLEWOOD CR,WHITEWOOD CR	ENGLEWOOD	HOMESTAKE MINING CO	I	SD	400	
* SPEARFISH CR,REDWATER CR	SPEARFISH 1	HOMESTAKE MINING CO	I	SD	4000	
* LITTLE WHITE R	WHITE RIVER	RON VINCENT LT & PWR	P	SD	250	
* GUADALUPE R	TP 4	GUADALUPE BLANCO RIV AUTH	M	TX	2400	1932
* GUADALUPE R	H 5	GUADALUPE BLANCO RIV AUTH	M	TX	2400	1931
* GUADALUPE R	H 4	GUADALUPE BLANCO RIV AUTH	M	TX	2400	1931
* GUADALUPE R	NOLTE TP 5	GUADALUPE BLANCO RIV AUTH	M	TX	2400	1927
* GUADALUPE R	ABBOTT TP-3	GUADALUPE BLANCO RIV AUTH	M	TX	2800	1927
* GUADALUPE R	DUNLAP TP 1	GUADALUPE BLANCO RIV AUTH	M	TX	3600	1927
* COLORADO R	L B JOHNSON	LOWER COLORADO R AUTH	M	TX	45000	1948
* COLORADO R	MARBLE FALLS	LOWER COLORADO R AUTH	M	TX	30000	1949
* COLORADO R	MANSFIELD	LOWER COLORADO R AUTH	M	TX	83700	1937
* COLORADO R	BUCHANAN	LOWER COLORADO R AUTH	M	TX	11250	
* COLORADO R	BUCHANAN	LOWER COLORADO R AUTH	M	TX	22500	1935
* COLORADO R	INKS	LOWER COLORADO R AUTH	M	TX	12500	1936
* COLORADO R	AUSTIN	LOWER COLORADO R AUTH	M	TX	13400	1937
* GUADALUPE R	MAX STARCKE (SEGUIN)	SEGUIN, CITY OF	M	TX	250	
* BEAVER R	BEAVER LOWER 2	BEAVER, CITY OF	M	UT	275	
* BOX ELDER CR	BRIGHAM	BRIGHAM CITY CORP	M	UT	1200	
* BOX ELDER CR	BOX ELDER	BRIGHAM CITY CORP	M	UT	500	
* COTTONWOOD CR,SAN PITCH R	EPHRAIM 2(COTTONWOOD	EPHRAIM, CITY OF	M	UT	205	
* PROVO R	HEBER	HEBER LT & PWR CO	M	UT	1750	
* OAK CR,SAN PITCH R	SPRING CITY	SPRING CITY CORP	M	UT	300	
* COTTONWOOD CR,LEEDS CR,VIRGIN	ST GEORGE(GUNLOCK)	ST GEORGE,CITY OF	M	UT	600	
* LITTLE COTTONWOOD CREEK	LOWER PLANT	WHITMORE OXYGEN	I	UT		
* PETEETNEET CR	PAYSON	STRAWBERRY WTR USERS ASSN	M	UT	400	
* SPANISH FORK	SPANISH FORK	STRAWBERRY WTR USERS ASSN	M	UT	3600	
* SPANISH FORK	SPANISH FORK 1	STRAWBERRY WTR USERS ASSN	M	UT	400	
* CITY CR	SALT LAKE CITY	TEMPLE GRANITE QUARRIES	I	UT	500	
* SNAKE CR	SNAKE CREEK	UTAH POWER AND LIGHT CO	P	UT	1180	
* BIG COTTONWOOD CR	GRANITE	UTAH POWER AND LIGHT CO	P	UT	2000	

* VIRGIN R	CEDAR 4 (LA VERKIN	UTAH POWER AND LIGHT CO	P	UT	1250	
* LOGAN R	LOGAN 1	UTAH STATE UNIV	M	UT	400	
* WEBER R	WANSHIP	WEBER BASIN WTR CONS DIST	M	UT	1900	
* WEBER R	GATEWAY	WEBER BASIN WTR CONS DIST	M	UT	4000	
* MEADOW CR,CRAIG CR,JAMES R	MEADOW CREEK	CRAIG BOTETOURT EL COOP	C	VA	300	
* DAN R	PINNACLES-TOWNES DAM	DANVILLE,CITY OF	M	VA	10125	
* OCCOQUAN CR,POTOMAC R	UPPER OCCOQUAN	FAIRFAX COUNTY WATER AUTH	M	VA	1000	
* OCCOQUAN CR,POTOMAC R	LOWER OCCOQUAN	FAIRFAX COUNTY WATER AUTH	M	VA	350	
* WILSON CR,NEW R	MOUTH OF WILSON	FIELDS MANUFACTURING CO	I	VA	250	
* SMITH R	MARTINSVILLE	MARTINSVILLE,CITY OF	M	VA	1300	
* KANAWHA CNL(JAMES R)	BYRD PARK	RICHMOND, CITY OF	M	VA	1125	1923
* WHITE R	BETHEL	BETHEL MILLS INC	I	VT	193	
* LEICESTER R,OTTER CR	SALISBURY	CENTRAL VT PUB SERV CORP	P	VT	1300	1917
* SUCKER BK, NESHOBE R	SILVER LAKE	CENTRAL VT PUB SERV CORP	P	VT	2200	1917
* POULNEY RIVER	CARVERS FALLS	CENTRAL VT PUB SERV CORP	P	VT		
* EAST CR, OTTER CR	PATCH	CENTRAL VT PUB SERV CORP	P	VT	400	
* EAST CR, OTTER CR	GLEN	CENTRAL VT PUB SERV CORP	P	VT	2000	
* EAST CR, OTTER CR	PITTSFORD	CENTRAL VT PUB SERV CORP	P	VT	3600	
* MISSISQUOI R	BAKERS FALLS	CITIZENS UNION 8	I	VT	600	
* MISSISQUOI R	TROY	CITIZENS UTILITIES CO	P	VT	600	
* LAMOILLE R	HARDWICK(WOLCOTT)	HARDWICK, VILLAGE OF	M	VT	1000	
* BOULDER CR,STEHEKIN R	BUCKNER	BUCKNER, HARRY S	I	WA	10	
* STEHEKIN R	STEHEKIN	CHELAN CO PUD 1	M	WA	200	
* RAILROAD CR,CHELAN R	LUCERNE RESORT	HOLDEN VILLAGE CORP	M	WA	25	
* CEDAR RIVER	CEDAR FALLS	SEATTLE CITY LIGHT	M	WA		
* KENNY CR,N FK NOOKSACK R	KENNY CREEK	KENNY CREEK HYDROELEC CO	R	WA	25	
* SAM'S CREEK	KAHN PRODUCTS	LOUIS KAHN	I	WA		
* CALISPELL CR,PEND OREILLE R	CALISPELL	PEND OREILLE CO PUD 1	M	WA	600	
* SPOKANE R	LITTLE FALLS	WASHINGTON WTR PWR CO	P	WA	32000	
* YELLOW R	BARRON	BARRON,CITY OF	M	WI	100	
* FOX R	NEENAH DAM	BERGSTROM PAPER CO	I	WI	400	
* FOX R	APPLETON (LOWER)	CONSOLIDATED PAPERS INC	I	WI	1445	
* EAU CLAIRE R	GORDON	DAHLBERG LT AND PWR CO	P	WI	257	
* TOTAGATIC R	NANCY	DAHLBERG LT AND PWR CO	P	WI	450	
* DUCK CR,TAGATZ CR	FIGOR	FIGOR, D J	I	WI	38	
* LITTLE WOLF	BIG FALLS	BIG FALLS, VILLAGE OF	M	WI	325	
* FOX RIVER	KIMBERLY	MIDTEC PAPER CORP	I	WI	2700	
* PINE RIVER	POY SIPPI	NORTH AMERICAN HYDRO INC	P	WI	75	
* BARABOO R	ISLAND WOOLEN	ISLAND WOOLEN CO	I	WI	412	
* LITTLE WHITE	WHITE RIVER	RON VINCENT LT & PWR	P	WI		
* EMBARRASS RIVER	CAROLINE DAM	GRANT, TOWN OF	M	WI		
* EMBARRASS RIVER	PELLA DAM	PELLA, TOWN OF	M	WI	100	
* KICKAPOO R	LA FARGE	LA FARGE VILLAGE	M	WI	120	
* SOUTH LITTLE WOLF	SCANDINAVIA DAM	SCANDINAVIA, TOWN OF	M	WI	81	
* WHITE RIVER	NESHKORO	NORTH AMERICAN HYDRO INC	P	WI		
* LOWER FOX	DEPERE PLANT	BEEMSTER ELECTRIC COMPANY	P	WI		
* BARABOO R	LA VALLE	LA VALLE EL CO	P	WI	50	
* BARABOO R	OAK STREET	MCARTHUR, GEORGE AND SON	I	WI	156	
* BARABOO R	LINEN MILL	MCARTHUR,GEORGE AND SON	I	WI	100	
* HALLS CR, BLACK R	MERILLAN	MERILLAN, VILLAGE OF	M	WI	100	
* MONTELLO R	HARRISVILLE	MILLER, DUANE J	I	WI	187	
* PINE R	PINE RIVER	MILLER,CLAIR	I	WI	100	

* MONTELLO LK,MONTELLO R	MONTELLO	MONTELLO GRANITE CO	I	WI	379
* MILL CR,WISCONSIN R	MUSCODA	MUSCODA,VILLAGE OF	M	WI	60
* FOUR MILE CR, WISCONSIN R	NEPCO LAKE	NEKOOSA PAPERS INC	I	WI	2920
* WAUTOMA R	WAUTOMA	NORTH AMER HYDRO INC	R	WI	252
* COUDERAY R	RADISSON	NORTH CENTRAL POWER CO	P	WI	393
* IRON R	ORIENTA FALLS	NORTHERN STATES POWER CO	P	WI	800
* ST CROIX R	ST CROIX FALLS	NORTHERN STATES POWER CO	P	WI	23200
* BALSAM R,APPLE R	BALSAM LAKE	NORTHWESTERN WIS ELEC CO	P	WI	68
* CLAM R	CLAM FALLS	NORTHWESTERN WIS ELEC CO	P	WI	112
* FOX R	PARDEEVILLE	PARDEEVILLE ELEC COMM	M	WI	50
* DUCK CR,TAGATZ CR	LAWRENCE	PIONEER PWR & LT CO	P	WI	200
* PRAIRIE R	MERRILL	WARD PAPER COMPANY	I	WI	135
* FOX R	APPLETON	WISCONSIN ELEC PWR CO	P	WI	1940
* WISCONSIN R	KILBOURN	WISCONSIN POWER & LIGHT CO	P	WI	8200
* WISCONSIN R	PRAIRIE DU SAC	WISCONSIN POWER & LIGHT CO	P	WI	28440

OWNER CLASS CODE:

C - COOPERATIVE
I - INDUSTRIAL
M - MUNICIPAL
P - PRIVATE UTILITY
R - PRIVATE NON-UTILITY
F - FEDERAL

Question 1a: Which of these projects were constructed before August 26, 1935, on a non-navigable river and have not since been improved?

Answer: The identification of all projects that were constructed on a non-navigable river before August 26, 1935, and that have not since been improved (and therefore are not required to be licensed), cannot be made until all the projects are reviewed and inspected. Of the projects listed in TABLE 1, the following projects have been identified, in UL dockets, as meeting the above criteria.

PROJECT NUMBER	PROJECT NAME	STATE
UL88-13	GLEN	VT
UL88-14	PATCH	VT
UL88-15	PITTSFORD	VT
UL88-18	DASHVILLE	NY
UL88-20	BERRIEN SPRINGS	MI
UL88-22	STURGEON POOL	NY
UL88-26	HARTENSTENE DAM	MI
UL88-28	LEIGHS MILL	ME
UL88-38	LEDBETTER LAKE	NC
UL89-1	GRAND FALLS	ME
UL89-2	WOODLAND	ME
UL89-6	COBBLE MOUNTAIN	MA
UL89-18	TURNER SHOALS	NC
UL89-19	TUXEDO	NC
UL89-20	DANIEL GREEN	NY

Question 1b: Which of these projects are non-jurisdictional?

Answer: A determination of whether a project is required to be licensed cannot be made until the project is investigated. Of the projects listed in TABLE 1, the following projects were reviewed and inspected in UL dockets, and have been found to not require licensing.

PROJECT NUMBER	PROJECT NAME	STATE
UL87-5	PARDEEVILLE	WI
UL87-25	APPLETON (LOWER)	WI
UL88-6	PILOT KNOB	CA
UL88-7	DROP 2	CA
UL88-8	DROP 3	CA
UL88-9	DROP 4	CA
UL88-10	DROP 5	CA
UL88-11	DROP 1	CA
UL88-13	GLEN	VT
UL88-14	PATCH	VT
UL88-15	PITTSFORD	VT
UL88-16	SALISBURY	VT
UL88-18	DASHVILLE	NY
UL88-20	BERRIEN SPRINGS	MI
UL88-22	STURGEON POOL	NY
UL88-24	MARTINSVILLE	VA
UL88-26	HARTENSTENE DAM	MI
UL88-27	WILSON PONDS	ME
UL88-28	LEIGHS MILL	ME
UL88-38	LEDBETTER LAKE	NC
UL89-1	GRAND FALLS	ME
UL89-2	WOODLAND	ME
UL89-6	COBBLE MOUNTAIN	MA
UL89-13	EDISON SAULT	MI
UL89-18	TURNER SHOALS	NC
UL89-19	TUXEDO	NC
UL89-20	DANIEL GREEN	NY

Question 1c: Which of these projects are jurisdictionally undetermined?

Answer: TABLE 2 lists the projects for which a jurisdictional determination has not been made.

TABLE 2

UNLICENSED AND OPERATING HYDROELECTRIC PROJECTS WHERE NO JURISDICTIONAL DETERMINATION HAS BEEN MADE

06/09/1989

* STREAM NAME	PLANT NAME	OWNER	CLASS	STATE	CAPACITY KW	CONST YEAR
***						
* KASNYKU BAY,CHATHAM STRAIT	HIDDEN FALLS	ALASKA DEPT FISH & GAME	M	AK	200	1979
* GOLD CR,GASTINEAU INLET	GOLD CREEK	ALASKA ELEC LT & PWR CO	P	AK	1600	
* WARM SPRINGS BAY	BAHOVEC	BAHOVEC,FRED	I	AK	3	
* SKECKLEY CR	SKECKLEY	BUCHAN & HEINEN PKG CO	I	AK	28	
* BARANOF R,WARM SPRING BAY	BARANOF WARM SPRING	GRUENING,CLARK S	R	AK	14	
* PURPLE LAKE	PURPLE LAKE	METLAKATLA PWR AND LIGHT	M	AK	3900	
* ONE MILE CR	ONE MILE	NEW ENGLAND FISH CO	I	AK	8	
* KODIAK ISLAND	PARKS	PARKS CANNING CO	I	AK	8	
* BARANOF R	SONNENBURG	SONNENBURG, WALLACE	I	AK	3	
* S CONSOL CNL(SALT R)	S CONSOLIDATED	SALT R PROJ AG IMP P DIST	M	AZ	1400	1980
* SALT R	HORSE MESA	SALT R PROJ AG IMP P DIST	M	AZ	99900	1969
* CROSS CUT CNL(SALT R)	CROSS CUT	SALT R PROJ AG IMP P DIST	M	AZ	3000	
* SALT R	ROOSEVELT	SALT R PROJ AG IMP P DIST	M	AZ	36000	
* SALT R	HORSE MESA	SALT R PROJ AG IMP P DIST	M	AZ	29[illegible]0	
* SALT R	MORMON FLAT	SALT R PROJ AG IMP P DIST	M	AZ	48600	
* SALT R	MORMON FLAT	SALT R PROJ AG IMP P DIST	M	AZ	9200	
* SALT R	STEWART MOUNTAIN	SALT R PROJ AG IMP P DIST	M	AZ	10400	
* TUOLUMNE R	R KIRKWOOD	HETCH HETCHY WTR & PWR	M	CA	104022	
* HETCH HETCHY AQUEDUCT	MOCCASIN CREEK	HETCH HETCHY WTR & PWR	M	CA	90000	
* CHERRY CR, TUOLUMNE R	D R HOLM	HETCH HETCHY WTR & PWR	M	CA	135000	
* E HIGHLINE CNL(COLO.R)	EAST HIGHLINE	IMPERIAL IRRIG DIST	M	CA	2415	
* W SIDE M CNL(COL.R)	TURNIP	IMPERIAL IRRIG DIST	M	CA	420	
* CENTER M CNL(COLO.R)	DOUBLE WEIR	IMPERIAL IRRIG DIST	M	CA	560	
* LA AQUE (SANTA CLARA R)	SAN FERNANDO	LOS ANGELES DEPT W AND P	M	CA	5600	
* LA AQUE (SANTA CLARA R)	FOOTHILL	LOS ANGELES DEPT W AND P	M	CA	11000	
* LA AQUE (SANTA CLARA R)	S FRANCISQUITO 2	LOS ANGELES DEPT W AND P	M	CA	42000	
* FRANKLIN CANYON, LOS ANGELES	FRANKLIN CANYON	LOS ANGELES DEPT W AND P	M	CA	2000	
* LA AQUE (SANTA CLARA R)	S FRANCISQUITO 1	LOS ANGELES DEPT W AND P	M	CA	64375	
* DIVISION CR, OWENS R	DIVISION CREEK	LOS ANGELES DEPT W AND P	M	CA	600	
* COTTONWOOD CR,OWENS R	COTTONWOOD 3	LOS ANGELES DEPT W AND P	M	CA	1500	
* OWENS R	PLEASANT VALLEY	LOS ANGELES DEPT W AND P	M	CA	3200	
* OWENS R	CONTROL GORGE	LOS ANGELES DEPT W AND P	M	CA	37500	
* OWENS R	MIDDLE GORGE	LOS ANGELES DEPT W AND P	M	CA	37500	
* OWENS R	UPPER GORGE	LOS ANGELES DEPT W AND P	M	CA	37500	
* LA AQUE (SANTA CLARA R)	HAIWEE	LOS ANGELES DEPT W AND P	M	CA	5600	
* BIG PINE CR, OWENS R	BIG PINE 3	LOS ANGELES,CITY OF	M	CA	3200	
* MIOCENE CNL(WBR NFK FEATHER R	COAL CANYON	PACIFIC GAS & ELECTRIC CO	P.	CA	1000	
* W BR N FK FEATHER R	LIME SADDLE	PACIFIC GAS & ELECTRIC CO	P	CA	2000	
* LYTLE CR, SANTA ANA R	FONTANA	SOUTHERN CALIF EDISON CO	P	CA	2950	
* MILL CR, SANTA ANA R	MILL CREEK 1	SOUTHERN CALIF EDISON CO	P	CA	800	
* SAN ANTONIO CR, WALNUT CR	ONTARIO 2	SOUTHERN CALIF EDISON CO	P	CA	320	
* SAN ANTONIO CR, WALNUT CR	SIERRA	SOUTHERN CALIF EDISON CO	P	CA	480	

* SAN ANTONIO CR, WALNUT CR	ONTARIO 1	SOUTHERN CALIF EDISON CO	P	CA	600	
* TUOLUMNE R	LA GRANGE	TURLOCK IRRIG DIST	M	CA	4000	1909
* SAN JUAN R	PAGOSA SPRINGS	LA PLATA ELEC ASSN INC	C	CO	200	
* ST VRAIN CR,BOULDER CR	LONGMONT	LONGMONT, CITY OF	M	CO	611	
* COLORADO R	SHOSHONE	PUBLIC SERVICE CO OF CO	P	CO	14400	
* COLORADO R	GRND VALLEY(PALISADES	PUBLIC SERVICE CO OF CO	P	CO	3000	
* BIG SQUAW CR,RIO GRANDE	SQUAW CREEK	TREGO, ERNEST E	I	CO	8	1948
* YANTIC R	GILMAN	BOZRAH LIGHT AND POWER CO	P	CT	250	1943
* BANTAM R	LITCHFIELD(BANTAM)	CONN LIGHT & POWER CO	P	CT	320	
* WINDSOR LOCKS CNL(CONN R)	WINDSOR LKS(ENFIELD	DEXTER C H AND SONS INC	I	CT	500	
* FARMINGTON R	RAINBOW	FARMINGTON RIVER POWER CO	P	CT	8000	
* SHETUCKET R	OCCUM	NORWICH, CITY OF	M	CT	800	
* ESTATOAH CR,TENNESSEE R	ESTATOAH	GEORGIA POWER CO	P	GA	240	
* SOGUE R	HABERSHAM	HABERSHAM MILLS	I	GA	1660	
* SOUTH R	SNAPPING SHOALS	THOMAS INDUSTRIES	I	GA	200	
* ETOWAH R	CARTERSVILLE	THOMPSON WEINMAN CO	I	GA	625	
* WAILUKU R	WAIAU	HAWAII ELECTRIC LIGHT CO	P	HI	1100	
* WAILUKU R	PUUEO	HAWAII ELECTRIC LIGHT CO	P	HI	2250	
* WAILOA DITCH	KAHEKA	HAWAIIAN COM & SUG CO	I	HI	4002	
* WAILOA DITCH	PAIA	HAWAIIAN COM & SUG CO	I	HI	800	
* LOWER HAMAKUA DITCH	HONOKAA	HONOKAA SUGAR CO	I	HI	800	
* KOHOANA R	WAIAWA	KEKAHA SUGAR CO LTD	I	HI	500	
* WAIMEA R	WAIMEA	KEKAHA SUGAR CO LTD	I	HI	1000	
* KOHALA DITCH	HAWI	KOHALA SUGAR CO	I	HI	350	
* S FK WAILUA R	LOWER LIHUE	LIHUE PLANTATION CO	I	HI	800	
* WAIHAI R,S FK WAILUA R	UPPER LIHUE	LIHUE PLANTATION CO	I	HI	500	
* KALAHEO R	KALAHEO	MCBRYDE SUGAR CO LTD	I	HI	1000	
* MAKAWELI R	HYDRO (KAUMAKANI)	OLOKELE SUGAR CO LTD	I	HI	500	
* WAINIHA R	WAINIHA	PIONEER MILL CO LTD	I	HI	3600	
* KAUAULA STREAM	KAUAULA	PIONEER MILL CO LTD	I	HI	450	
* MAQUOKETA R	MAQUOKETA	IOWA ELEC LT AND PWR CO	P	IA	1200	
* MISSISSIPPI R	KEOKUK L&D 19	UNION ELECTRIC CO	P	IA	124800	1911
* CEDAR R	WAVERLY (EAST HYDRO)	WAVERLY, CITY OF	M	IA	495	
* BEAR CR,S FK PAYETTE R	CLIFFORD ROSENBALM	ELLIS,WAYNE R	I	ID	8	
* BLUE MOON CR,SULPHUR CR,M FK	BLUE MOON CR SALMON	HORNBACK,MARVIN E	I	ID	30	
* SNAKE R(OFFSTREAM)	CLEAR LAKE	IDAHO POWER CO	P	ID	2500	
* SNAKE R	THOUSAND SPRINGS	IDAHO POWER CO	P	ID	8800	
* SODA CR,BEAR R	SODA SPRINGS	SODA SPRINGS, CITY OF	M	ID	100	
* SODA CR,BEAR R	SODA SPRINGS 1	SODA SPRINGS, CITY OF	M	ID	200	
* SODA CR,BEAR R	SODA SPRINGS 4	SODA SPRINGS, CITY OF	M	ID	300	
* ST JOSEPH R	ST JOE DAM	FT WAYNE, CITY OF	M	IN	100	
* FAWN R	GREENFIELD MILLS	RINKEL H G & SONS	I	IN	152	
* HOLYOKE CNL(CONN R)	HOLYOKE MILLS	BROWN CO	I	MA	3110	
* CONN CNL(CONN R)	TURNERS FALLS	ESLEECK MANUFACTURING CO	I	MA	450	
* HOUSATONIC R	SOUTH LEE	HURLBUT PAPER CO	I	MA	361	
* N NASHUA R	FITCHBURG	JAMES RIVER MASSACHUSETTS	I	MA	250	1924
* GOOSE CR,HOUSATONIC R	LAKE MAY	LAKE MAY POWER CO	P	MA	700	
* SAWMILL R	MARTIN MACH CO DAM	MARTIN MACHINE CO	I	MA	75	
* SWIFT R	WINDSOR	METRO DIST COMM	M	MA	1200	
* HOLYOKE CNL(CONN R)	HOLYOKE	MIGLIOZZI,LOUIS P	R	MA	350	
* BLACKSTONE R	FARNUMSVILLE	O DONNELL J J WOOLENS	I	MA	112	
* HOLYOKE CNL(CONN R)	HOLYOKE	PARSONS PAPER CO	I	MA	486	

* MILLERS R	ATHOL	STARRETT L S CO	I	MA	112	
* CHICOPEE R	MUNGERVILLE	WESTERN MASS ELECTRIC CO	P	MA	3200	
* WESTFIELD R	RUSSELL	WESTFIELD RIVER PAPER CO	I	MA	700	
* BEAVERDAM CR,WICOMICO R	PARKER POND	HINMAN,W H	I	MD	40	
* LITTLE FALLS,GUNPOWDER R	GORES MILL	LINTZ,CLARENCE	I	MD	10	
* DEER CR,SUSUEHANNA R	WILSON MILL DAM	WILLIAMS,ANN T	R	MD	23	
* PISCATAQUIS R	DOVER FOXCROFT	AMERICAN WOOLEN CO	I	ME	854	
* LEWISTON CNL(ANDROSCOGGIN R)	ANDROSCOGGIN	BATES MANUFACTURING CO	I	ME	2566	1924
* DAMARISCOTTA LK	DAMARISCOTTA	DAMARISCOTTA MANUF CO	I	ME	400	1907
* KENNEBEC R	GREAT NORTHERN PAPER	GREAT NORTHERN NEKOOSA CO	I	ME	6000	
* WILSON POND,SEBEC R	GREENVILLE	GREENVILLE MFG CO	I	ME	576	
* LEWISTON CNL(ANDROSCOGGIN R)	LEWISTON(LIBBEY)	LIBBEY W S CO	I	ME	750	
* SANDY R	NORRIDGEWOCK	MADISON,TOWN OF	M	ME	450	
* ANDROSCOGGIN R	WORUMBO(EAST)	MAX MILLER & CO INC	I	ME	900	1920
* ST CROIX R	MILLTOWN	NEW BRUNSWICK ELEC POWER	P	ME	3036	
* ANDROSCOGGIN R	CABOT MFG CO DAM	PEJEPSCOT PAPER/HEARST CO	I	ME	12000	
* GREAT WORKS STR,PENOBSCOT R	GREAT WORKS	PENOBSCOT CHEMICAL	I	ME	4680	
* SACO R	SACO REALTY DAM	SACO REALTY CO	I	ME	790	
* ESCANABA R	ESCANABA 2	CLEVELAND CLIFFS IRON CO	I	MI	2000	
* DOWAGIAC CR,ST JOSEPH R	NILES	NILES, CITY OF	M	MI	460	
* PINE R	ST LOUIS	ST LOUIS, CITY OF	M	MI	400	
* BOARDMAN R	ELK RAPIDS(KEYSTONE)	TRAVERSE CITY,CITY OF	M	MI	750	
* OTTER TAIL R	TAPLIN GORGE	OTTER TAIL POWER CO	P	MN	560	
* MISSISSIPPI R	BEMIDJI	OTTER TAIL POWER CO	P	MN	740	1905
* REDWOOD R	REDWOOD FALLS	REDWOOD FALLS,CITY OF	M	MN	500	
* ZUMBRO R	ROCHESTER	ROCHESTER, CITY OF	M	MN	2680	
* RED LAKE R	THIEF RIVER FALLS	THIEF R FALLS,CITY OF	M	MN	550	
* SECOND BROAD R	CLIFFSIDE	CONE MILLS CORP	I	NC	1625	
* FIRST BROAD R	STICE SHOALS	DUKE POWER CO	P	NC	600	
* MIDDLE FK MUDDY CR	MIDDLE FORK	NEW R LT & PWR CO	P	NC	180	
* LOWER LITTLE R	MILLERSVILLE	RHODES WHITNER MILLS	I	NC	320	
* TAR R	ROCKY MOUNT	ROCKY MOUNT MILLS	I	NC	1600	
* ROCKY R	ROCKY RIVER	WOODY T C	P	NC	160	
* FRENCHMAN CR,REPUBLICAN R	IMPERIAL	IMPERIAL, CITY OF	M	NE	100	
* BIG BLUE R	BLUE SPRINGS 2	NEBRASKA PUB PWR DIST	M	NE	418	
* MINNECHADUZA CR,NIOBRARA R	MINNECHADUZA	NEBRASKA PUB PWR DIST	M	NE	200	
* NIOBRARA R	FORT NIOBRARA	NEBRASKA PUB PWR DIST	M	NE	300	
* PLATTE R	KEARNEY	NEBRASKA PUB PWR DIST	M	NE	1500	
* NIOBRARA R	SPENCER 5/	NEBRASKA PUB PWR DIST	M	NE	2400	
* BIG BLUE R	BARNESTON	NORRIS PPD/NE MUN P P	M	NE	800	
* CEDAR R	SPALDING	SPALDING,CITY OF	M	NE	140	
* BIG BLUE R	WILBER	WILBER HYDRO ELEC PLANT	P	NE	260	
* SUGAR R	CLAREMONT WEST	COY PAPER CO	I	NH	500	
* ELLIS R	GOODRICH FALLS	GOODRICH FALLS HYDRO ELEC CO	P	NH	650	
* NEWFOUND R	IPC NO 1	INTERNATIONAL PACKING CORP	I	NH	168	
* NEWFOUND R	IPC NO 2	INTERNATIONAL PACKING CORP	I	NH	150	
* COHAS BK,MERRIMACK R	LOW STATION	MANCHESTER,CITY OF	M	NH	375	
* SALMON FALLS R	ROWE	MILLENIUM PWR INC	R	NH	60	
* CONTOOCOOK R	MILL WHEEL	MONADNOCK MILLS INC	I	NH	750	
* CONTOOCOOK R	PIERCE STATION	MONADNOCK MILLS INC	I	NH	720	
* CONNECTICUT R	RYEGATE	RYEGATE PAPER CO	I	NH	1860	
* SALMON FALLS R	MILTON N ROCHESTER	SPAULDING FIBER CO INC	I	NH	312	

* COCHECO R	HATFIELD	WYANDOTTE HYDRO ASSOC	R	NH	235	1983
* COCHECO R	ROCHESTER	WYANDOTTE WORSTED CO	I	NH	100	
* MUSCONETCONG R	WARREN GLEN	RIEGEL PAPER CORP	I	NJ	720	
* MUSCONETCONG R	HUGHESVILLE	RIEGEL PAPER CORP	I	NJ	444	
* CARSON R	LAHONTAN	SIERRA PACIFIC POWER CO	P	NV	2400	
* CARSON R	26 FOOT DROP	SIERRA PACIFIC POWER CO	P	NV	800	
* FISHKILL CR,HUDSON R	BEACON	BRAENDLY DYE WORKS INC	I	NY	100	
* GENESEE R	KODAK PARK	EASTMAN KODAK CO	I	NY	300	
* SARANAC R	PLATTSBURG 1	GEORGIA-PACIFIC CORP	I	NY	2400	
* SARANAC R	PLATTSBURG 2	GEORGIA-PACIFIC CORP	I	NY	850	
* SARANAC R	TREADWELL MILLS	GEORGIA-PACIFIC CORP ET AL	I	NY	2400	
* SARANAC R	PLATTSBURG	IMPERIAL PAPER CO	I	NY	600	
* ESOPUS CR,HUDSON R	SAUGERTIES	MARTIN CANTINE CO	I	NY	25000	
* W CANADA CR	LITTLE FALLS	NIAGARA MOHAWK PWR CORP	P	NY	150	
* RONDOUT AQUE (RONDOUT CR)	GRAHAMSVILLE	ORANGE & ROCKLAND UTILS	P	NY	18000	
* WISCOY CR,GENESEE R	WISCOY 170	ROCHESTER GAS & ELEC CORP	P	NY	1080	
* WISCOY CR,GENESEE R	MT MORRIS 172	ROCHESTER GAS & ELEC CORP	P	NY	222	
* CATTARAUGUS CR,LAKE ERIE	CATTARAUGUS CREEK	SPRINGVILLE,VILLAGE OF	M	NY	600	
* POWDER R	BAKER	BAKER, CITY OF	M	OR	200	
* DITCH CR, HOOD R	REED ROAD	FARMERS IRRIG DIST	M	OR	160	1981
* BREITENBUSH R	BREITENBUSH	KENNEDY, E C	I	OR	10	
* WILLAMETTE R	LAKE OSWEGO	LAKE OSWEGO CORP	R	OR	400	
* WILLAMETTE R	ALBANY	PACIFIC POWER & LIGHT CO	P	OR	800	
* DESCHUTES R	CLINE FALLS	PACIFIC POWER & LIGHT CO	P	OR	1000	
* N SANTIAM R	STAYTON	PACIFIC POWER & LIGHT CO	P	OR	600	
* L BUTTE CR,ROGUE R	EAGLE POINT	PACIFIC POWER & LIGHT CO	P	OR	2813	
* N SANTIAM R	MARION INVESTMENT	SANTIAM WATER CONTROL DIST	M	OR	900	
* N UMPQUA R	WINCHESTER	WINCHESTER WTR CONTROL DIST	M	OR	1300	1983
* LOYALSOCK CR,W BR SUSQUEHANN	HILLSGROVE	LEWIS T C COMPANY	I	PA	100	
* BEAVER R	UNION DRAW	REPUBLIC STEEL CORP	I	PA	100	
* RIO TORO NEGRO	TORO NEGRO 2	PUERTO RICO WTR RES AUTH	M	PR	1900	
* RIO JACAQUAS(TORO NEGRO R)	TORO NEGRO 1	PUERTO RICO WTR RES AUTH	M	PR	4320	
* RIO JORDAN,RIO VIVI	CAONILLAS 2	PUERTO RICO WTR RES AUTH	M	PR	3600	
* RIO GUAYANES(VACAS R)	GARZAS 1	PUERTO RICO WTR RES AUTH	M	PR	7200	
* RIO YAUCO(PRIETO R)	YAUCO II	PUERTO RICO WTR RES AUTH	M	PR	9000	
* RIO GUAYANES(VACAS R)	GARZAS 2	PUERTO RICO WTR RES AUTH	M	PR	5040	
* RIO LOCO(PRIETO R)	YAUCO I	PUERTO RICO WTR RES AUTH	M	PR	25000	
* RIO CAONILLAS	CAONILLAS 1	PUERTO RICO WTR RES AUTH	M	PR	18000	
* RIO GRANDE DE ARECIBO	DOS BOCAS	PUERTO RICO WTR RES AUTH	M	PR	10500	
* N BR PAWTUXET R	PROVIDENCE	PROVIDENCE,CITY OF	M	RI	1500	
* HORSE CR	GRANITEVILLE	GRANITEVILLE CO	I	SC	450	
* HORSE CR	VAUCLUSE	GRANITEVILLE CO	I	SC	480	
* BLACK CR	HARTSVILLE	SONOCO PRODUCTS CO	I	SC	318	
* S FK PACOLET R	R B SIMMS(SPARTANBUR	SPARTANBURG,CITY OF	M	SC	1000	
* LAWSON FK,PACOLET R	WHITNEY	WHITNEY MILLS	I	SC	200	
* SPEARFISH CR,REDWATER CR	SPEARFISH 2	HOMESTAKE MINING CO	I	SD	4000	
* ENGLEWOOD CR,WHITEWOOD CR	ENGLEWOOD	HOMESTAKE MINING CO	I	SD	400	
* SPEARFISH CR,REDWATER CR	SPEARFISH 1	HOMESTAKE MINING CO	I	SD	4000	
* LITTLE WHITE R	WHITE RIVER	RON VINCENT LT & PWR	P	SD	250	
* GUADALUPE R	TP 4	GUADALUPE BLANCO RIV AUTH	M	TX	2400	1932
* GUADALUPE R	ABBOTT TP-3	GUADALUPE BLANCO RIV AUTH	M	TX	2800	1927
* BEAVER R	BEAVER LOWER 2	BEAVER, CITY OF	M	UT	275	

* BOX ELDER CR	BRIGHAM	BRIGHAM CITY CORP	M	UT	1200	
* BOX ELDER CR	BOX ELDER	BRIGHAM CITY CORP	M	UT	500	
* COTTONWOOD CR,SAN PITCH R	EPHRAIM 2(COTTONWOOD	EPHRAIM, CITY OF	M	UT	205	
* OAK CR,SAN PITCH R	SPRING CITY	SPRING CITY CORP	M	UT	300	
* COTTONWOOD CR,LEEDS CR,VIRGIN	ST GEORGE(GUNLOCK)	ST GEORGE,CITY OF	M	UT	600	
* PETEETNEET CR	PAYSON	STRAWBERRY WTR USERS ASSN	M	UT	400	
* SPANISH FORK	SPANISH FORK	STRAWBERRY WTR USERS ASSN	M	UT	3600	
* SPANISH FORK	SPANISH FORK 1	STRAWBERRY WTR USERS ASSN	M	UT	400	
* CITY CR	SALT LAKE CITY	TEMPLE GRANITE QUARRIES	I	UT	500	
* SNAKE CR	SNAKE CREEK	UTAH POWER AND LIGHT CO	P	UT	1180	
* VIRGIN R	CEDAR 4 (LA VERKIN	UTAH POWER AND LIGHT CO	P	UT	1250	
* LOGAN R	LOGAN 1	UTAH STATE UNIV	M	UT	400	
* WEBER R	WANSHIP	WEBER BASIN WTR CONS DIST	M	UT	1900	
* WEBER R	GATEWAY	WEBER BASIN WTR CONS DIST	M	UT	4000	
* MEADOW CR,CRAIG CR,JAMES R	MEADOW CREEK	CRAIG BOTETOURT EL COOP	C	VA	300	
* WILSON CR,NEW R	MOUTH OF WILSON	FIELDS MANUFACTURING CO	I	VA	250	
* KANAWHA CNL(JAMES R)	BYRD PARK	RICHMOND, CITY OF	M	VA	1125	1923
* WHITE R	BETHEL	BETHEL MILLS INC	I	VT	193	
* MISSISQUOI R	BAKERS FALLS	CITIZENS UNION 8	I	VT	600	
* MISSISQUOI R	TROY	CITIZENS UTILITIES CO	P	VT	600	
* LAMOILLE R	HARDWICK(WOLCOTT)	HARDWICK, VILLAGE OF	M	VT	1000	
* BOULDER CR,STEHEKIN R	BUCKNER	BUCKNER, HARRY S	I	WA	10	
* STEHEKIN R	STEHEKIN	CHELAN CO PUD 1	M	WA	200	
* RAILROAD CR,CHELAN P	LUCERNE RESORT	HOLDEN VILLAGE CORP	M	WA	25	
* KENNY CR,N FK NOOKSACK R	KENNY CREEK	KENNY CREEK HYDROELEC CO	R	WA	25	
* CALISPELL CR,PEND OREILLE R	CALISPELL	PEND OREILLE CO PUD 1	M	WA	600	
* SPOKANE R	LITTLE FALLS	WASHINGTON WTR PWR CO	P	WA	32000	
* YELLOW R	BARRON	BARRON,CITY OF	M	WI	100	
* FOX R	NEENAH DAM	BERGSTROM PAPER CO	I	WI	400	
* EAU CLAIRE R	GORDON	DAHLBERG LT AND PWR CO	P	WI	257	
* TOTAGATIC R	NANCY	DAHLBERG LT AND PWR CO	P	WI	450	
* DUCK CR,TAGATZ CR	FIGOR	FIGOR, D J	I	WI	38	
* BARABOO R	ISLAND WOOLEN	ISLAND WOOLEN CO	I	WI	412	
* BARABOO R	LA VALLE	LA VALLE EL CO	P	WI	50	
* BARABOO R	OAK STREET	MCARTHUR, GEORGE AND SON	I	WI	156	
* BARABOO R	LINEN MILL	MCARTHUR,GEORGE AND SON	I	WI	100	
* HALLS CR, BLACK R	MERILLAN	MERILLAN, VILLAGE OF	M	WI	100	
* MONTELLO R	HARRISVILLE	MILLER, DUANE J	I	WI	187	
* PINE R	PINE RIVER	MILLER,CLAIR	I	WI	100	
* MONTELLO LK,MONTELLO R	MONTELLO	MONTELLO GRANITE CO	I	WI	379	
* MILL CR,WISCONSIN R	MUSCODA	MUSCODA,VILLAGE OF	M	WI	60	
* FOUR MILE CR, WISCONSIN R	NEPCO LAKE	NEKOOSA PAPERS INC	I	WI	2920	
* WAUTOMA R	WAUTOMA	NORTH AMER HYDRO INC	R	WI	252	
* COUDERAY R	RADISSON	NORTH CENTRAL POWER CO	P	WI	393	
* IRON R	ORIENTA FALLS	NORTHERN STATES POWER CO	P	WI	800	
* ST CROIX R	ST CROIX FALLS	NORTHERN STATES POWER CO	P	WI	23200	
* BALSAM R,APPLE R	BALSAM LAKE	NORTHWESTERN WIS ELEC CO	P	WI	68	
* CLAM R	CLAM FALLS	NORTHWESTERN WIS ELEC CO	P	WI	112	
* DUCK CR,TAGATZ CR	LAWRENCE	PIONEER PWR & LT CO	P	WI	200	
* PRAIRIE R	MERRILL	WARD PAPER COMPANY	I	WI	135	
* FOX R	APPLETON	WISCONSIN ELEC PWR CO	P	WI	1940	
* WISCONSIN R	KILBOURN	WISCONSIN POWER & LIGHT CO	P	WI	8200	

* WISCONSIN R	PRAIRIE DU SAC	WISCONSIN POWER & LIGHT CO	P	WI	28440

OWNER CLASS CODE:

C - COOPERATIVE
I - INDUSTRIAL
M - MUNICIPAL
P - PRIVATE UTILITY
R - PRIVATE NON-UTILITY
F - FEDERAL

Question 1d: Which of these projects are now under investigation or review as to jurisdiction and the requirement to be licensed?

Answer: In the interest of public safety and environmental protection, the Commission staff has focused its review on unlicensed projects with a high or significant hazard classification, and on the projects where we receive environmental complaints. TABLE 3 lists projects now under investigation.

TABLE 3

PROJECTS NOW UNDER INVESTIGATION OR REVIEW AS TO REQUIREMENT FOR LICENSING

Project Name	State	Owner
Albany	OR	Pacific Power & Light
Austin	TX	Lower Colorado River Authority
Buchanan	TX	Lower Colorado River Authority
Bakers Falls	VT	Citizens Utilities Company
Big Falls	WI	Big Falls, Village of
Boyds Mill	SC	Duke Power Company
Burnham	ME	Consolidated Hydro
Caroline Dam	MI	Roy Kleisch
Cartersville	GA	ECC America, Inc.
Claremont West	NH	Coy Paper Company
Damariscotta Mills	ME	Consolidated Hydro
DePere Plant	WI	Beemster Electric Co.
Diamond	OR	Port of Hood River
Estatoah	GA	Georgia Power Company
Granite Shoals	TX	Lower Colorado River Authority
Graniteville	SC	Graniteville Corporation
Hughsville	NJ	James River Corp./Riegel Division
Inks	TX	Lower Colorado River Authority
Lakehurst	IA	I E Industries
Longmont	CO	Longmont, City of (CO)
Mansfield	TX	Lower Colorado River Authority

Project Name	State	Owner
Marble Falls	TX	Lower Colorado River Authority
Marcal Paper	ME	Consolidated Hydro
Mills Mills Sta 172	NY	Rochester Gas & Electric Corp.
Moline Power Dam	IA	Iowa Illinois Gas & Electric Co.
Mouth of Wilson	VA	Fields Manufacturing
Nepco L/Four Mile Ck	WI	Nekooska Papers, Inc.
New Castle	VA	Craig-Botetourt Corporation
Pella Dam	MI	Roy Kleisch
Pennessewasee	ME	Consolidated Hydro
Ramseur Mill	NC	J & T Hydro Company
Sandy River	ME	Madison, Town of
Scandinavia Dam	MI	Roy Kleisch
Simms, R.B.	SC	Spartanburg, City of
Star Mill	IN	David Zinkie
Stice Shoals	NC	Duke Power Company
Swan Falls	ME	Lawrence Keddy
Stayton	OR	Pacific Power & Light
Vaucluse	SC	Graniteville Corporation
Warren Glen	NJ	James River Corp/Riegel Division
Wiscoy Station 170	NY	Rochester Gas & Electric Corp.

Question 2: Please identify all projects which the Commission had previously found to be non-jurisdictional, but were subsequently found to be jurisdictional, or are currently under investigation as to jurisdiction. Please provide the Committee a copy of all related orders.

Answer: Three projects which the Commission had previously found not to require licensing were subsequently found to require licensing. Six other projects of this type are under investigation. These nine projects are listed in TABLE 4. Copies of the Commission's orders regarding these projects are attached.

Due to the voluminous nature of the material submitted they have not been reprinted here.

TABLE 4

PROJECTS FOUND TO BE JURISDICTIONAL:

DOCKET NUMBER	PROJECT NUMBER	PROJECT NAME	ORIGINAL ORDER ISSUED	NEW ORDER ISSUED
DI-10	UL87-13	RILEY	7/25/21	3/16/87
DI-175	P-2694	QUEEN'S CREEK	2/18/47	10/20/76 1/
DI-15	EL88-37	DIX	1/24/22	12/21/88 2/

PROJECTS UNDER REVIEW:

DOCKET NUMBER	PROJECT NUMBER	PROJECT NAME	ORIGINAL ORDER ISSUED
E-6208	UL89-25	AUSTIN	4/6/49
	UL89-26	MARBLE FALLS	4/6/49
	UL89-27	GRANITE SHOALS	4/6/49
DI-101	UL89-28	INKS	7/8/27
	UL89-29	BUCHANAN	7/8/27
DI-181		NEVERSINK	2/19/48

1/ Affirmed, Nantahala Power and Light Co. v. Federal Power Commission, 384 F.2d 200 (4th Cir. 1967).

2/ Rehearing pending.

Question 3: Please provide the Committee a list of hydroelectric projects which have been, or are, on the Commission's UL docket. Indicate the disposition of those dockets and provide the Committee with a copy of the Commission's order if action has been taken.

Answer: The projects that have been, or are, on the Commission's UL docket are listed in TABLE 5. Attached are copies of orders issued by Commission staff and the Commission in these dockets.

Due to the voluminous nature of the material submitted they have not been reprinted here.

TABLE 5

DETERMINATION OF UNLICENSED DOCKETS

Project Number	Project Name	State	Determination of Order
UL86-1	Tower	MI	Licensing Required
UL86-2	Paper Mill Dam	MI	Licensing Required 1/
UL86-3	Allegan City Dam	MI	Licensing Required
UL87-1	Moores Park	MI	Licensing Required
UL87-2	North Lansing	MI	Licensing Required
UL87-3	Upper Occoquan	VA	Licensing Required
UL87-4	Niles	MI	Licensing Required
UL87-5	Pardeeville	WI	Licensing not required
UL87-6	Poysippi	WI	Licensing Required
UL87-7	Constantine	MI	Licensing Required
UL87-8	AuTrain	MI	Licensing Required 1/
UL87-9	Lower Occoquan	VA	Licensing Required
UL87-10	Imperial Paper	NY	Licensing Required
UL87-11	Mix	MI	Licensing Required
UL87-12	Smithville	MI	Licensing Required
UL87-13	Riley	MI	Licensing Required
UL87-14	Hoist	MI	Licensing Required 1/
UL87-15	McClure	MI	Licensing Required 1/

1/ Appeal pending.

Project Number	Project Name	State	Determination of Order
UL87-16	Bennetts Bridge	NY	Licensing Required 2/
UL87-17	Lighthouse Hill	NY	Licensing Required 2/
UL87-18	Badger Pond	NH	Licensing Required
UL87-19	Central	MN	Licensing Required
UL87-20	Hoot Lake	MN	Licensing Required
UL87-21	Dayton Hollow	MN	Licensing Required
UL87-22	Friberg Dam	MN	Licensing Required
UL87-23	Pisgah	MN	Licensing Required
UL87-24	Portland	MI	Licensing Required
UL87-25	Appleton (Lower)	WI	Licensing not required
UL87-26	Irving	MI	Licensing Required
UL87-27	Middleville	MI	Licensing Required
UL87-28	Eustis Dam	ME	Licensing Required
UL87-29	Pinnacles	VA	Licensing Required
UL87-30	Three Rivers	MI	Licensing Required 2/
UL88-1	Dix	KY	Licensing Required 2/
UL88-2	Falls River	CT	Licensing Required
UL88-3	St. Louis	MI	Licensing Required
UL88-4	Oakdale Station	MA	Licensing Required
UL88-5	Cosgrove	MA	Licensing Required
UL88-6	Pilot Knob	CA	Licensing not required
UL88-7	Drop 2	CA	Licensing not required

2/ Rehearing pending.

3-4

Project Number	Project Name	State	Determination of Order
UL88-8	Drop 3	CA	Licensing not required
UL88-9	Drop 4	CA	Licensing not required
UL88-10	Drop 5	CA	Licensing not required
UL88-11	Drop 1	CA	Licensing not required
UL88-12	Carvers Falls	VT	Licensing Required
UL88-13	Glen	VT	Licensing not required
UL88-14	Patch	VT	Licensing not required
UL88-15	Pittsford	VT	Licensing not required
UL88-16	Salisbury	VT	Licensing not required
UL88-17	Silver Lake	VT	Licensing Required 1/
UL88-18	Dashville	NY	Licensing not required
UL88-19	Allen Falls	NY	Licensing Required
UL88-20	Berrien Springs	MI	Licensing not required
UL88-21	Parishville	NY	Licensing Required
UL88-22	Sturgeon	NY	Licensing not required
UL88-23	Cedar Falls	WA	Licensing Required
UL88-24	Martinsville	VA	Licensing not required
UL88-25	Estes Lake Dam	ME	Licensing Required
UL88-26	Hartenstene Dam	MI	Licensing not required
UL88-27	Wilson Ponds	ME	Licensing not required
UL88-28	Leighs Mill	ME	Licensing not required
UL88-29	Dwight	MA	Licensing Required
UL88-30	Star Mill	IN	Licensing Required 1/

1/ Appeal pending.

Project Number	Project Name	State	Determination of Order
UL88-31	Abbeville	SC	Licensing Required
UL88-32	South Berwick Dam	ME	Licensing Required
UL88-33	Red Bridge	MA	Licensing Required
UL88-34	Putts Bridge	MA	Licensing Required
UL88-35	Indian Orchard	MA	Licensing Required
UL88-36	Carthage	NY	Licensing Required
UL88-37	Kimberly Dam	WI	Licensing Required
UL88-38	Ledbetter Lake	NC	Licensing not required
UL89-1	Grand Falls	ME	Licensing not required
UL89-2	Woodland	ME	Licensing not required
UL89-3	Apthorp	NH	Licensing Required
UL89-4	Filtrine	NH	Licensing Required
UL89-5	Niles	MI	NOT DETERMINED
UL89-6	Cobble Mountain	MA	Licensing not required
UL89-7	Rocky Mount Mills	NC	NOT DETERMINED
UL89-8	Indian River	AK	Licensing Required 1/
UL89-12	McKenzie	OR	Licensing Required
UL89-13	Edison Sault	MI	Licensing not required
UL89-14	Big Falls	WI	Licensing Required
UL89-15	Blackstone Mills	PA	Licensing Required 1/
UL89-16	Old Falls	ME	Licensing Required 1/

1/ Appeal pending.

Project Number	Project Name	State	Determination of Order
UL89-17	Montello	MI	NOT DETERMINED
UL89-18	Turner Shoals	NC	Licensing not required
UL89-19	Tuxedo (L.Summit)	NC	Licensing not required
UL89-20	Daniel Green	NY	Licensing not required
UL89-23	Stayton	OR	NOT DETERMINED
UL89-25	Mansfield	TX	NOT DETERMINED
UL89-26	Marble Falls	TX	NOT DETERMINED
UL89-27	Granite Shoals	TX	NOT DETERMINED
UL89-28	Inks	TX	NOT DETERMINED
UL89-29	Buchanan	TX	NOT DETERMINED
UL89-30	Austin	TX	NOT DETERMINED
UL89-31	Crystal Falls	MI	Licensing Required

Senator BRADLEY. Our next witness will be—actually, we will have a panel. The first witness will be Victor Roque, who is Vice President of Orange and Rockland Utilities, on behalf of Orange and Rockland Utilities and the Edison Electric Institute.

The second individual is John Turner, Director of Government Affairs, Georgia-Pacific Corporation. And the third is John Echeverria, General Counsel of American Rivers.

Let me welcome the three of you to the committee, subcommittee, and let me suggest to Mr. Roque that—and say to Senator McClure, that although it has been a few years since we have had a claim-jumping in New Jersey, a more recent phenomenon in Idaho, Mr. Roque could probably shed some light on this emerging phenomenon in the absence of this bill.

And I would like for you to begin, Mr. Roque, but before you do, Senator Conrad, do you have any comments to make?

Senator CONRAD. No, I would be glad to withhold so we can get to these witnesses.

Senator BRADLEY. Thank you very much. Mr. Roque, please take the floor.

STATEMENT OF VICTOR A. ROQUE, VICE PRESIDENT, GENERAL COUNSEL AND SECRETARY, ORANGE AND ROCKLAND UTILITIES, INC., ACCOMPANIED BY FRANK E. FISCHER, VICE PRESIDENT, ENGINEERING AND PRODUCTION

Mr. ROQUE. Thank you, Senator. Good afternoon, members of the committee. My name is Victor Roque, and I am Vice President and General Counsel of Orange and Rockland Utilities which is headquartered approximately 25 miles northwest of Midtown New York City. I am accompanied by Frank E. Fischer, Vice President of Engineering and Production for O&R and also Malcolm Marshall in the audience who represents Kentucky Utilities.

We appreciate the committee's invitation to participate in today's hearings on S. 635, the Hydroelectric Fairness Act of 1989 sponsored by Senators McClure, Johnston, Bradley, Garn, Nickles, Murkowski and Lautenberg. And I am pleased to represent both O&R's corporate position and that of the Association of Investor Utilities, the Edison Electric Institute. Written testimony from both organizations have been filed with the committee.

O&R is an electric and natural gas utility serving a growing area of more than 650,000 customers in Rockland and Orange counties, New York, portions of Bergen, Passaic and Sussex Counties in New Jersey, and portions of Pike County in Pennsylvania.

We feel particularly well qualified to speak on this subject because we, of all the many hundreds of owners of pre-1935 hydro projects, are the first target of a blatant claim-jumping attempt that has placed us exactly in the middle of the proverbial rock and a hard place.

On the one hand, we believe that Congress protected hypro projects such as ours in 1935 when the grandfather projects that were built on non-navigable streams prior to that date.

On the other hand, a group of adventurers from New Hampshire was relying on just that part of the Federal Power Act and is using the financial benefits afforded by PURPA to claim a profit handsomely from one of our projects known as the Rio Project.

Our situation is a little like having someone come along and steal the house you own and offer to rent it back to you so you can continue to use it. That is why we are here today to ask you for your support for the Hydroelectric Fairness Act of 1989.

The small but very useful hydro plants that comprise what we have called the Mongaup river projects are the Rio Project built in 1927, with approximately 10 megawatts of capacity; the Mongaup Falls Project built in 1923, with approximately four megawatts of capacity; and the Swinging Bridge Project originally built in 1930, with approximately 12½ megawatts of capacity.

These facilities have been operated lawfully and continuously since the 1930's with the exception of a period between 1979 and 1987 when the Rio Project was out of service as a result of an accident that collapsed the wood-stave penstock, a one-and-a-half mile tube that carried water from the Rio down to the powerhouse.

For the entire time that the project was out of service, it was officially included in our capacity plans since we were waiting for an increase in demand for electricity to justify the necessary repair work. That time came in 1986 when we removed, replaced and rehabilitated the old penstock.

Over the past 20 years, O&R has been before FERC on several occasions to argue the merits of the protections afforded to owners of pre-1935 hydro projects built on non-navigable streams as described in section 23(b), as originally enacted, of the Federal Power Act. Simply stated, it has been and continues to be our position that such owners are protected by Congress from having to file for licenses to operate their hydro projects.

Nevertheless, because we were confronted with a license application from a third party that was initially accepted by FERC, we decided to file for license ourselves in order to make our ownership clear to all.

During these proceedings, we observed what we considered to be a loophole in the laws governing this matter, and if that loophole is not closed, the implications may be severe for consumers in dozens of States throughout the country.

The plan of Rio Associates for taking over our project was reasonably clear. Prior to filing their application, the principals met with various agencies including the New York State Department of Environmental Conservation, but not with O&R, to obtain information that they needed to file their license application. Then they filed their application, and on December 29th, 1985, just in time to qualify under the Internal Revenue Code for a 20 percent tax credit on investment and energy products of this nature that was to expire 2 days later.

Once they had the license, they then would have had the right to buy or condemn the Rio Project from Orange and Rockland and sell the output back to us. This approach would have produced a windfall profit, tax credits and a guaranteed market, all from one venture.

Needles to say, we determined to fight these plans. But whatever the outcome of the deliberations on the Hydroelectric Fairness Act of 1989, we will continue to see our application for a license through to its conclusion at the Commission. However, I urge you to favorably consider this legislation so that the nightmare we have experienced for the past 4 years will not affect other owners of pre-1935 projects.

Since this Nation was founded, Congress has been charged with responsibility for making policy. Passage of this bill is important not just to customers of Orange & Rockland, but also to customers of other businesses who might be the targets of hostile takeovers by creative, outside interlopers in the future.

Now, we have heard it said that the Hydroelectric Fairness Act of 1989 is anticompetitive. Nothing can be further from the truth. Since 1978, with the passage of PURPA, Congress has clearly expressed its intent for future energy policy by establishing competition and encouraging the search for new sources of energy to meet growing energy needs nationwide. We recognize this basic shift in public policy, and earlier this year, we became the first utility in New York State and one of the first in New Jersey as well to receive approval for competitive bidding to purchase power from alternate sources.

But this loophole in the law perverts and frustrates Congressional intent. It merely creates competition for competition's sake, not for the benefit of the consumer through lower energy prices and not for the benefit of this Nation in helping to identify and encourage the development of new sources of energy.

We at Orange and Rockland believe that this loophole can be closed with the passage of this bill. By prohibiting the issuance of an original license for a pre-1935 nonjurisdictional project to anyone but the present owner, this bill would excise a serious inequity without expanding or modifying FERC's licensing jurisdiction. Owners of such projects would not have to file licensing applications in order to protect their property, but if they did so on that old licensing criteria, they would be granted a license. Once the project is licensed, the preference for the original owner would no longer apply. Thus, when the original license expires, the project would face the potential for relicensing competition, just as any other license project.

Further, passage of this legislation would not limit, restrict or affect the Commission's ability to meet its duties and obligations under the Federal Power Act to ensure that issuing a license would be in the overall public interest.

At issue here today is a conflict that pits reason and fairness against greed and a perverse interpretation of the law.

The forceable takeover of our Rio Project would not produce a single energy of new energy. In fact, an independent engineering firm has verified that the plan submitted to FERC by Rio Associates actually would cause output to be reduced.

What is more, the financial implications to our customers of such a takeover would amount to additional costs of more than $50 million in windfall profits for these out-of-State predators over the 30-year life of a license.

Equally important is an examination of the fairness of allowing such a raid to take place on someone else's property. PURPA and New York State law may inadvertently provide incentives for these adventurers to sell this power back to O&R if FERC awards them a license, but they are under no obligation to do so. Indeed, if a higher-paying customer could be found, they could legally sell the Rio Project's output to someone else.

But how could reasonable people believe it is fair to allow precious kilowatts to be diverted from consumers who sorely need them at a time when the northeast and this utility in particular is beginning to face the prospect of capacity shortfalls?

On behalf of the thousands of consumers who could be hurt by claim jumpers seeking to misapply the intent of the law, I urge you to consider the Hydroelectric Fairness Act of 1989 as a means to enable you to give clear direction to the policies you wish to frame for the energy future of this Nation.

Mr. Chairman, this concludes my testimony on this matter. I would be happy to respond to any questions you may have as well as Mr. Frank Fischer.

[The prepared statement of Mr. Roque follows:]

TESTIMONY OF

ORANGE AND ROCKLAND UTILITIES, INC.

ON

S. 635

BEFORE THE
SUBCOMMITTEE ON WATER & POWER
OF THE
COMMITTEE ON ENERGY AND
NATURAL RESOURCES

UNITED STATES SENATE

May 18, 1989

United States Senate
Committee on Energy and National Resources

Testimony of Victor A. Roque

My name is Victor A. Roque, and I am Vice President, General Counsel and Secretary of Orange and Rockland Utilities, Inc. which is headquartered about 25 miles northwest of midtown New York City. I am accompanied by Mr. Frank E. Fischer, Vice President of Engineering and Production. Orange and Rockland is an electric and gas utility serving Rockland County and parts of Orange and Sullivan Counties in New York; portions of Bergen, Passaic and Sussex Counties, New Jersey; and a part of Pike County, Pennsylvania. Our electric operations supply a population of about 650,000. Orange and Rockland is a member of the New York Power Pool, and is interconnected with the PJM system.

We appreciate the Committee's invitation to participate in today's hearings on S.635, the Hydroelectric Fairness Act of 1989, introduced by Senators McClure, Johnston, Garn, Nickles, Bradley, Murkowski and Lautenberg.

We believe the bill is aptly named, and has the laudable objective of correcting an inequity that has arisen out of FERC's encouragement of attempts by entrepreneurs to use Part I of the Federal Power Act to gain control over lawfully operating unlicensed older hydroelectric plants, and then require the public to buy the plants' electricity at highly inflated prices. Congress clearly did not intend that FERC should encourage such an inequity. Orange and Rockland's experience with the attempts of a claim-jumper from New Hampshire, calling itself Rio Hydroelectric Associates, to take over Orange and Rockland's Rio Project, is an example of this inequity.

The Rio Project

Orange and Rockland operates three small - but very useful - hydroelectric plants on the non-navigable Mongaup River in New York State.[1] These are the Rio Project, built in 1927 (approximately 10 Mw of capacity), the Mongaup Falls Project, built in 1923 (approximately 4 Mw of capacity), and the Swinging Bridge Project, originally built in 1930 (approximately 12.5 Mw of capacity). A map showing these plants and related dams and reservoirs is attached as Exhibit 1 to my testimony.

The Mongaup River has been fully developed since these projects were built. This development has benefited the customers of Orange and Rockland for 60 years.

---

[1] There is no disagreement that the Mongaup River is not navigable. The Corps of Engineers determined the Mongaup River to be non-navigable in 1930. See House Doc. No. 660, 71st Cong. 3d Sess. (Dec. 3, 1930). The FERC reached the same conclusion in 1987.

Because the Mongaup is not navigable, construction of the Rio, Mongaup Falls, and Swinging Bridge Projects did not require a license under the Federal Water Power Act (now Part I of the Federal Power Act). Applicable state law governed their construction and operation, and still does. From time to time, since the early 1960's, FERC staff has suggested that the three projects should be licensed under the Power Act. In fact, Orange and Rockland filed license applications in those years but they were not processed. In 1980, FERC dismissed those applications and informed Orange and Rockland that it should apply for a license no later than December, 1980. In response, in 1981, Orange and Rockland filed a request for a declaratory ruling, urging that the projects are not required to be licensed because they were built before the 1935 amendments to the Power Act brought hydro projects on non-navigable streams within the purview of the Act. This request lay dormant at FERC until April 6, 1987 when FERC responded that Orange and Rockland was not required to get licenses for the Rio and Mongaup Falls Projects, but that it must obtain a license for the Swinging Bridge Project because construction work done after 1935 brought the Project under the Act. Orange and Rockland accepted that determination without appeal. A copy of the April 6, 1987 Order is attached as Exhibit 2.

Of importance here is the fact that the Rio Project was lawfully constructed and has been legally operated by Orange and

Rockland since 1926 without a FERC license. The FERC itself determined this to be so in its now final April 6, 1987 ruling.

All of the projects, including Rio, have been continually operated. However, the Rio Project was out of service between 1979 and 1986 because of an accident. The Project's wood-stave penstock, a 7,000 ft. long cylindrical tube that carried water from Rio dam down to the powerhouse, collapsed in 1979. Due to surplus capacity on our system in the early 1980s, it was economically prudent to defer the cost of rehabilitating the penstock until 1986. Thus, the Company maintained the project unrepaired until 1986, during which time the penstock was replaced with a new steel structure. The Rio Project went back into service in February 1987. However, the Rio Project remained on the Company's books as "used and useful" plant after 1979, and was always a component in Orange and Rockland's planning for meeting capacity needs.

Rio Hydroelectric Associates

In the autumn of 1985, Orange and Rockland officials learned that Rio Hydroelectric Associates ("RHA") of New Hampshire was preparing to file an application with FERC for a Federal Power Act license for the Rio Project. RHA had consulted with the New York State Department of Environmental Conservation ("DEC") and other agencies - but not with Orange and Rockland - prior to filing its application on December 29, 1985. RHA's license application was thus filed just in time to qualify under the Internal Revenue Code for a 20 percent tax credit on investment in energy projects of this nature. The credit would not be available to applicants after December 31 of that year.

RHA's plan was obvious: It wanted to get a license, either buy or condemn the Rio Project from Orange and Rockland, and then sell the Project's output to Orange and Rockland at a mandatory rate of at least 6 cents per kilowatt hour pursuant to §66-c of the New York Public Service Law. Since the cost of energy from the restored project was considerably lower, RHA would make a good profit, get tax credits, and have a sure market, all at the ratepayers' and public's expense. In fact, the additional cost to consumers over a 30-year license term would amount to more than $50 million.

Orange and Rockland determined to resist RHA. On December 17, 1985, it filed an application for a preliminary permit with FERC for the Rio, Mongaup Falls and Swinging Bridge Projects. In September 1986, FERC declared RHA's license application deficient, and only accepted it as complete in February 1987. By that time, Orange and Rockland had already put the Project back in service with its new penstock, and it was supplying power to Orange and Rockland's customers.

Thereafter, FERC finally acted upon Orange and Rockland's long dormant 1981 petition for a declaratory ruling. As I mentioned previously, on April 6, 1987, FERC ruled that Orange and Rockland was not required to seek a license for the Rio Project because the Project was built before 1935 on a nonnavigable stream. Nonetheless, FERC dismissed Orange and Rockland's application for a preliminary permit for Rio, but granted permits for the other two projects.

Orange and Rockland then moved that RHA's license application be dismissed because - as FERC's April 6, 1987 ruling concluded - Orange and Rockland was lawfully operating the project without a license. Orange and Rockland's position was and is that one lawfully operating a pre-1935 project on a non-navigable stream does so with the permission of Congress, granted by Section 23(b), as originally enacted,[2] of the Federal Power

---

[2] Section 23 of the 1920 Federal Water Power Act, 41 Stat. 1075 (1920), provides: "That the provisions of this Act shall not be construed as affecting any permits or valid existing right of way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality, holding or possessing such permit, right of way, or authority may apply for a license hereunder, and upon such application the commission may issue to any such applicant a license in accordance with the provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder ....

That any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, may in their discretion file declaration of such intention with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the commission shall not so

(continued...)

Act. Such consent, in lieu of a license, overcomes the prohibition of Section 9 of the 1899 River and Harbor Act[3] against construction or maintenance of dams in waters over which Congress has jurisdiction without the consent of Congress. The 1920 Federal Water Power Act, in fact, was a specialized exception[4] to the 1899 River and Harbor Act, to facilitate the development of hydroelectric projects.[5] Accordingly, although Orange and Rockland did not have a license under the Federal Power Act, Congress already had granted Orange and Rockland permission to construct and operate the Rio Project superseding the need to get a license. This follows from the original Section 23's language giving the permission of Congress to construct plants on non-navigable streams.[6] Orange and Rockland believes that FERC should not cancel - in fact is not authorized to cancel - Congress's permission by entertaining a license

---

[2] (...continued)
find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws."

[3] 33 U.S.C.A. §401 (West 1986).

[4] See Scenic Hudson Prevention Conference v. Calloway, 370 F. Supp. 162, 166-167 (S.D.N.Y. 1973), aff'd, 499 F.2d 127 (2d Cir. 1974).

[5] See Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395 (1975).

[6] See FPC v. Union Electric Co., 381 U.S. 90, at 105-106 (1965) (permission granted in §23(b) applies to all waters over which Congress has jurisdiction).

application from another entity - RHA in this instance - for a lawfully operating, pre-1935 project.

Thus far, however, FERC has deferred consideration of Orange and Rockland's legal arguments, and has decided that RHA's license application proceeding should continue. See Exhibits 3 and 4 attached.

The Competing License Applications

As matters now stand, RHA's license application remains pending at FERC. Indeed, faced with FERC's interpretation of the Act, Orange and Rockland, in order to protect its ownership of the Rio Project, filed license applications for the Rio, Mongaup Falls and Swinging Bridge Projects on September 8, 1988. The applications were accepted as complete for filing on March 27, 1989.

RHA's and Orange and Rockland's Rio Project applications are thus in competition and will continue to be processed as competing license applications. FERC will ultimately chose one and reject the other. If RHA is selected, and is able to raise the funds needed to condemn the Project, it will take over the Rio Project. The mode of operation it proposes will generate significantly less energy than Orange and Rockland presently generates, and the cost to the consumers will be about $50 million over the next 30 years.

Conclusion

The Hydroelectric Fairness Act of 1989 will assure that consumers are no longer exposed to the risk of paying more for the electricity from existing unlicensed pre-1935 hydro projects. Any interpretation of the Federal Power Act which either forces such projects to be licensed by their owners, or lets them be taken by outsiders who would then sell the project's electricity back to the consumer at a much higher price, is perverse. It is bad public policy. The wiser policy, Orange and Rockland submits respectfully, is to allow these older plants to continue operating lawfully without licenses, and without threat of being taken over by new owners who get licenses. Therefore, the Hydroelectric Fairness Act of 1989 is sound. It corrects an inequity in the FERC hydroelectric licensing program. We urge its enactment.

Thank you.

EXHIBIT 1

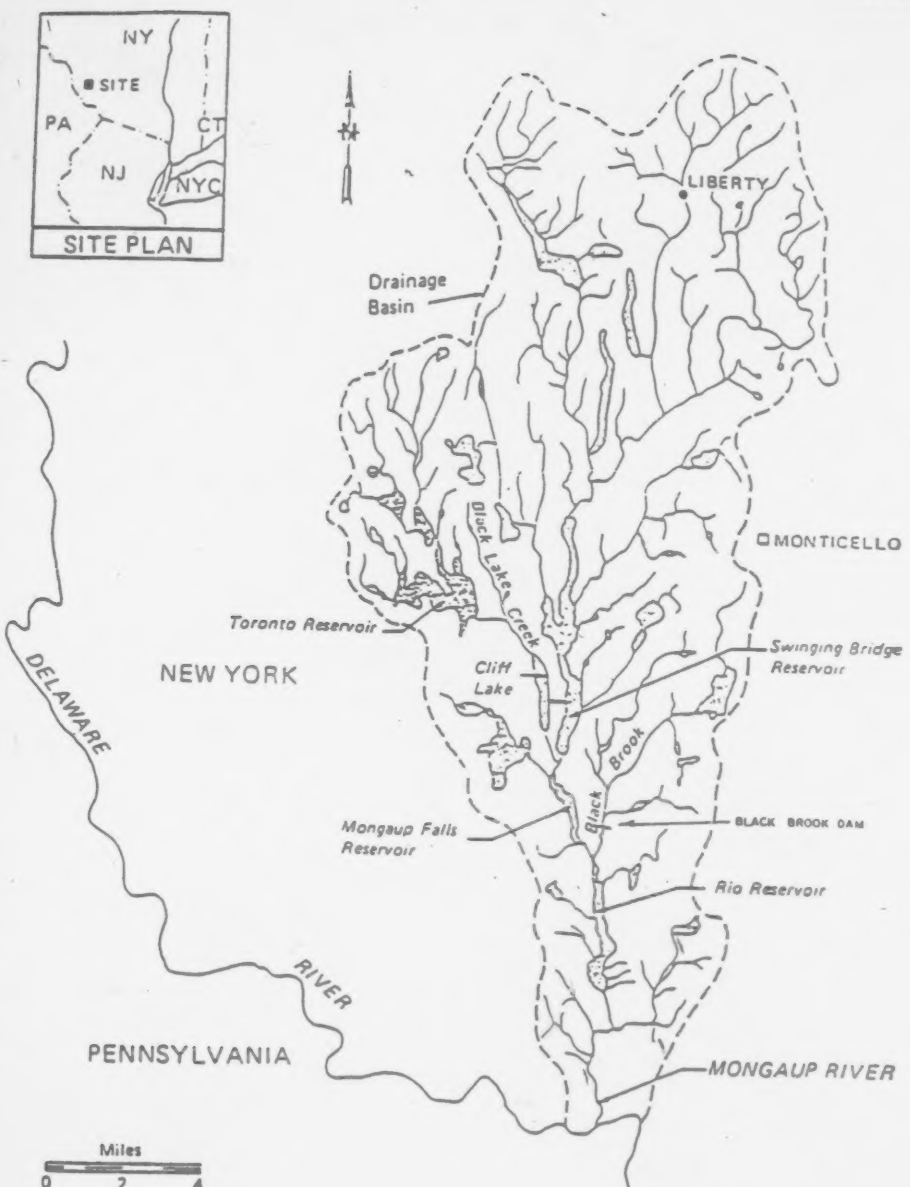
NY
SITE
PA
CT
NJ
NYC
SITE PLAN
N
Drainage Basin
LIBERTY
MONTICELLO
Black Lake Creek
Toronto Reservoir
Swinging Bridge Reservoir
Cliff Lake
NEW YORK
DELAWARE
Black Brook
Mongaup Falls Reservoir
BLACK BROOK DAM
Rio Reservoir
RIVER
PENNSYLVANIA
MONGAUP RIVER
Miles
0
2
4

EXHIBIT 2

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

3016*

Orange and Rockland Utilities, Inc. Docket No. EL 81-

ORDER ON JURISDICTION

(Issued April 6, 1987)

Orange and Rockland Utilities, Inc. (O&R), filed on January 29, 1981, a Disclaimer of Jurisdiction and a Petition for Declaratory Order requesting that the Commission issue an order finding that it has no jurisdiction over O&R's Mongaup Basin Project, which consists of three individual hydroelectric developments, the Rio Development, the Mongaup Development, and the Swinging Bridge Development, all located on the Mongaup River in Sullivan and Orange Counties, New York.

On December 18, 1985, O&R filed an application for preliminary permit for the Mongaup Basin Project No. 9690. 1/ On December 30, 1985, Rio Hydroelectric Associates (RHA) filed an application for major license for the Rio Project No. 9754, which competes with the Rio Development included in O&R's permit application for the Mongaup Basin.

CASE SUMMARY

The three developments have installed capacities ranging from approximately 4,000 kW to approximately 11,750 kW. Their capacities and locations on the Mongaup River are as follows:

(1)	Rio Project	10,000 kW - Orange County, NY
(2)	Mongaup Project	4,000 kW - Sullivan County, NY
(3)	Swinging Bridge Project	11,750 kW - Sullivan County, NY

JURISDICTION

A. Navigability

Section 23(b) of the Federal Power Act (FPA), 16 U.S.C. § 817 (1986), requires licensing of projects located on navigable waters of the United States. O&R asserts that the Mongaup River is a non-navigable tributary of the Delaware River. The Commission's

---

1/ The cover letter accompanying the permit application states that O&R's sole purpose for filing the permit application is to maintain priority of application for license while the Commission determines jurisdiction.

2/ RHA's license application was accepted for filing on February 9, 1987.

staff has conducted historical research of the navigability of the Mongaup River and has found that, based on the information available at this time, there is insufficient evidence to find that the Mongaup River at the development sites is navigable within the meaning of Section 3(8) of the FPA. If in the future new evidence comes to light that shows the river is navigable at these developments, Section 23(b) would require licensing.

B. Post-1935 Construction

Section 23(b) of the FPA requires licensing of a project located on non-navigable Commerce Clause waters, if any new project works were constructed after 1935, and the project would affect interstate or foreign commerce. See Puget Sound Power and Light Co. v. FPC, 557 F.2d 1311 (9th Cir. 1977).

O&R asserts that the project works of the Rio, Mongaup, and Swinging Bridge Developments were designed and built as a single construction project initiated in 1922, and that therefore licensing of the developments cannot be required pursuant to Section 23(b) of the FPA.

1. Rio Development

The Rio Development was constructed and placed into operation prior to 1935. Since 1935, only routine maintenance and repair work as been conducted. 3/

2. Mongaup Development

The Mongaup Development was constructed and placed into operation prior to 1935. Since 1935, only routine maintenance and repair work has been conducted.

3. Swinging Bridge Development

The Swinging Bridge Development includes three dams (Toronto, Cliff Lake, and Swinging Bridge), three reservoirs, and two powerhouses. Construction of the Toronto and Swinging Bridge Dams and the first powerhouse was completed, and the project was placed into operation, prior to 1935. The Cliff Lake Dam and the second powerhouse, which has an installed capacity of 6,750 kW, were constructed and placed into service in 1939.

3/ In October 1979, approximately 4,000 feet of the 7,000-foot-long penstock collapsed. The penstock remains in a state of neglect, and the project remains deactivated.

Even if the three developments were designed and built as a single construction program, it is clear that the Cliff Lake Dam and the second powerhouse constituted post-1935 construction at the Swinging Bridge Development, as they were not a part of the original construction program. 4/ Moreover, if the three developments really are indivisible, as O&R suggests, then a finding of jurisdiction as to the Swinging Bridge Development would extend to the other two developments as well. 5/ However, based on the information currently available, we are unable to conclude that the Swinging Bridge, Mongaup, and Rio Developments comprise a single unit of development for jurisdictional purposes. Although they may be operated in a coordinated manner, it appears that each can operate independently of the others.

The generation of electricity at the Swinging Bridge Development affects the interests of interstate commerce. It is connected via 69-kV lines to the Mongaup substation, which is an integral part of O&R's transmission system. O&R operates generation and transmission facilities in New York and transmits power to its subsidiary companies in New Jersey and Pennsylvania. Since the interests of interstate commerce are affected by the power generated by the Swinging Bridge Development, and construction within the meaning of Section 23(b) of the FPA has taken place subsequent to the 1935 amendments to the FPA, O&R's Swinging Bridge Development is required to be licensed pursuant to Section 23(b) of the FPA.

4/ As originally planned, the Swinging Bridge and Toronto Reservoirs were to be connected by a long pipeline. See O&R's Application for License of the Swinging Bridge Project, filed July 1, 1966, in Project No. 2605. That plan proved uneconomical, however. Id. Instead, the additional dam and powerhouse were planned and built after 1935 to increase the project's capacity. Id. at 15.

5/ Even if this were the case, nothing in the Federal Power Act requires that all three developments be authorized under one license. Whether any one development would be ultimately licensed by itself or under the same license as one or both of the other developments, and whether the developments would be licensed to the same or different entities, the Commission would ensure that any project works it licenses would be operated in a manner consistent with the comprehensive development of the river basin.

The Director orders:

(A) Based on information currently available, the Rio and Mongaup Developments, in their present states, are not required to be licensed by Section 23(b) of the FPA. This order is without prejudice to any future determination, upon new or additional evidence, that licensing is required.

(B) O&R must file with the Secretary of the Commission, within 45 days of the date of this order, a schedule for expeditiously submitting a license application for the Swinging Bridge Development. The license application must be submitted no later than 18 months after issuance of this order.

(C) The Swinging Bridge Development has been identified by Commission staff as having a significant hazard potential. Therefore, O&R must file with the Secretary of the Commission, within 45 days of the date of this order, a schedule for complying, no later than 6 months from the date of this order, with Part 12 of the Commission's regulations (see 18 C.F.R. Part 12, subpart B and C thereof) with respect to the Swinging Bridge Development. O&R must file monthly status reports, which include its progress toward the filing of documents required by Part 12, with the Secretary of the Commission and the appropriate regional office. Filing of reports shall commence within 30 days of the submittal of the schedule to the Commission.

(D) This order is subject to appeal pursuant to 18 C.F.R. § 385.1902 (1986). Failure to comply with this order will cause this case to be referred to the Office of the General Counsel for appropriate action. 6/

Fred E. Springer
Director, Office of
Hydropower Licensing

6/ This may include enforcement action. Also, enforcement action may be taken for previous violations regardless of compliance with this order.

EXHIBIT 3

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ORANGE AND ROCKLAND UTILITIES, INC.) Project No. 9690-001,
) 9690-002,
RIO HYDROELECTRIC ASSOCIATES, INC.) Project No. 9754-001

APPLICATION FOR REHEARING BY ORANGE AND ROCKLAND UTILITIES, INC. OF DENIAL OF MOTION TO DISMISS RIO HYDROELECTRIC ASSOCIATES' LICENSE APPLICATION

For the first time in the history of the Federal Power Act (the "Act"), the Federal Energy Regulatory Commission (the "Commission") is contemplating issuing a license for a pre-existing, operating hydroelectric project with no post-1935 construction to a person with no ownership interest in the project. Orange and Rockland Utilities, Inc. ("Orange and Rockland"), has owned and operated the Rio Project (the "Project"), since its construction in 1927. As such, and as the Staff of the Commission itself has determined, the Project is not subject to the Commission's licensing jurisdiction.

Rio Hydroelectric Associates ("Rio Associates") is seeking to obtain the Commission's sanction to expropriate Orange and Rockland's Rio Project. If successful, Rio Associates would reduce the annual energy output of the Project by at least 5 million KWH and sell the remaining electricity back to Orange and Rockland at the New York State statutory minimum payment of 6 cents per KWH, which would substantially increase costs to Orange and Rockland's customers.

Notwithstanding the undisputed facts concerning the Project's construction and continued lawful operation, Orange and Rockland's motion to dismiss the license application filed by Rio Associates was denied by the Commission in its "Order on Appeals and Motions", issued September 11, 1987 (the "Order"). By continuing to entertain Rio Associates' application, the Commission disregards the language and intent of the Act, as well as judicial decisions construing it. Therefore, pursuant to §313(a) of the Act (16 U.S.C.A. §825l(a) (West 1985)), Orange and Rockland hereby applies for rehearing of Ordering Clause A of the Order. Order, mimeo at p. 8.

BACKGROUND

As the Commission's Order recounts, Orange and Rockland's predecessor company built the Rio Project before 1935 on the Mongaup River in Orange County, New York. The Project continues to be operated and maintained by Orange and Rockland, and has never been licensed under Part I of the Federal Power Act (16 U.S.C.A. §§791a-823b (West 1985 and Supp. 1987)). Accordingly, the Office of Hydropower Licensing of the Commission ruled on April 6, 1987 that the Rio Project is not required to be licensed under §23(b) of the Federal Power Act (16 U.S.C.A. §817 (West Supp. 1987)). (See Orange and Rockland Utilities, Inc., Docket No. EL81-22, 39 FERC ¶ 62,028 (April 6, 1987)). That ruling has not been appealed and, therefore, is final. Thus, there is no dispute that the Rio Project is an unaltered pre-1935 project, operating on a nonnavigable stream, and that, as such, it is not required to be licensed, even though its output enters the interstate electric grid.

On December 30, 1985, Rio Associates, a limited partnership of private investors located in New Hampshire, filed an application for a license for the Rio Project. Rio Associates' purpose is to take over the 10 megawatt Rio Project, which currently provides energy for less than 3 cents per KWH and re-sell the Project's output to Orange and Rockland for at least 6 cents/KWH, under provisions of the Public Utilities Regulatory Policies Act ("PURPA") and the New York Public Service Law. In addition, Rio Associates seeks to reap associated tax credits and depreciation benefits allegedly grandfathered under the liberal tax code provisions in effect in 1985. Orange and Rockland objected to Rio Associates' plan in a series of filings with the Commission. Nevertheless, the Commission accepted Rio Associates' license application for filing in February 1987, and solicited public comments to be submitted by May 18, 1987.

Orange and Rockland moved the Commission on May 18, 1987, to dismiss Rio Associates' license application,1/ pointing out that on April 6, 1987, the Office of Hydropower Licensing had issued an Order on Jurisdiction in Docket No. EL81-22, which ruled that the Rio Project was not required to be licensed.

1/ Motion to Dismiss Application for License for Nonjurisdictional Project (filed May 18, 1987).

Orange and Rockland Utilities, Inc., 39 FERC ¶ 62,028 (April 6, 1987).

The Order on Jurisdiction stated that the Mongaup River is not navigable at the development site, and that the Rio Development exhibits no post-1935 construction.[2/] Under Section 23(b) of the Act, 16 U.S.C.A. §817 (West Supp. 1987), the absence both of navigability and of post-1935 construction denies the Commission authority to require licensing. Accordingly, the Order on Jurisdiction concluded, the Rio Project is "not required to be licensed by Section 23(b) of the [Act]." 39 FERC at p. 63,055.

The Commission's Order on Appeals and Motions, to which this application for rehearing pertains, denied Orange and Rockland's motion to dismiss Rio Associates' application, first on the theory that the Commission's authority under §4(e) of the Federal Power Act (16 U.S.C.A. §797(e) (West Supp. 1987)) is broader than its authority under §23(b) (Order, mimeo at p. 3), and second because Rio Associates proposes to add new project works to the Rio Project that would increase its existing capacity. (Order, mimeo at p. 4). The Order relies heavily on the Commission's recent decision in Clifton Power Corp., 39 FERC ¶ 61,117 (1987).

[2/] 39 FERC at pp. 63,054-055. To qualify as "Post-1935 construction," the construction must have increased the project's head, generating capacity, or have otherwise significantly modified the project's pre-1935 design or operation. Puget Sound Power & Light Co. v. Federal Power Comm'n, 557 F.2d 1311, 1316 (9th Cir. 1977).

ARGUMENT

Each of the arguments advanced by the Commission in its denial of Orange and Rockland's Motion to Dismiss is flawed. First, Section 4(e) of the Act provides no authority here, because its application to the Rio Project is barred by Section 23(b), which is an express limitation on the authority otherwise conferred by §4(e). Second, Rio Associates actually plan to decrease the Project's capacity. Third, whatever its validity, the doctrine of Clifton, in which a project owner sought to license its own unlicensed project, cannot be extrapolated to this case, in which a non-owner seeks to license a lawfully operated unlicensed project that is owned by someone else. For the reasons outlined below, Orange and Rockland respectfully submits that the reasoning supporting the Order, as applied to the facts in this case, is faulty, and that this application for rehearing should be granted. This dispute involves a straightforward question of law, without factual disagreement, and is ripe for determination.[3]

---

[3] Orange and Rockland is compelled to file this application for rehearing at this time to preserve its right to seek judicial review.

I. THE RIO PROJECT IS NOT REQUIRED TO BE LICENSED UNDER §23(b) AND SECTION 4(e) DOES NOT EMPOWER THE COMMISSION TO REVOKE THAT EXCEPTION

A. The Rio Project Enjoys a Statutory Exception from the Licensing Requirements of the Act.

There is no dispute, in fact, there is agreement, that Orange and Rockland lawfully maintains and operates the Rio Project, and is not obligated to seek a license for the Project under §23(b). 39 FERC ¶ 62,028 (April 6, 1987). Orange and Rockland's authority to operate and maintain the Project derives from Section 23 of the Act, and, as such, the Project is immune from the Commission's licensing authority.

Prior to 1935, any person intending to construct any project in nonnavigable waters could decide, in its discretion, whether to file with the Commission a declaration of intention.

Section 23, prior to the amendments enacted in 1935, stated:

> Any person . . . intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce . . . may in their discretion file declaration of such intention with the Commission. . . . If the commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

16 U.S.C.A. §817 (West 1985). If the owner of a project to be located in nonnavigable waters chose not to file a declaration of intention, the Commission lacked authority to require a license on the ground that the project would affect interstate commerce. Farmington River Power Co. v. Federal Power Comm'n, 455 F.2d 86, 89 (2d Cir. 1972). Under those circumstances, Congress expressly granted permission to construct the project, subject only to the requirements of State law.

The Court in Farmington clearly repudiated the Commission's claim of jurisdiction to license a project for which no declaration of intention was filed. The court said:

> [T]here is not a word in either the statute itself or its legislative history which even implies that it would be illegal for one who had made no discretionary filing to maintain an unlicensed project on a nonnavigable stream.

455 F.2d at 89. The legislative history of the 1920 Act leaves no doubt that Congress did not intend to require licensing of dams across nonnavigable waters, though a company declining to file a declaration of intention bore the risk that the stream later would be found navigable. 59 Cong. Rec. 7729 (1920). Thus, if a company declined to file a declaration of intent, the Act permitted it to build a project in nonnavigable waters with complete impunity, exempt from the licensing jurisdiction of the Commission. 455 F.2d at 90, citing Federal Power Comm'n v. Union Electric Co., 381 U.S. 90, 109 (1965).

This remains the law. Congress knowingly perpetuated the exclusion of pre-existing, unaltered projects from the jurisdiction of the Act when it amended Section 23(b) in 1935 to make filing a declaration of intention mandatory rather than discretionary. If Congress had intended to revoke the Section 23 immunity of pre-existing, lawfully operating unlicensed projects, it would have done so at that time. Instead, Congress refrained from infringing on the existing rights of owners to continue to operate such projects. The Commission may not now abrogate these rights unless Congress or Orange and Rockland takes some action to bring the Rio Project within its licensing jurisdiction under Section 23(b).

Orange and Rockland has not performed any construction since 1935 or taken any other action that triggers the jurisdiction of the Commission under 1935 amendments to the Act. The only construction on a project located on a nonnavigable waterway that would render that project subject to the licensing jurisdiction of the Commission would be construction that increases the project's head, generating capacity, or water storage capacity, or otherwise significantly modifies the project's pre-1935 design or operation. Absent post-1935 construction, a project is "exempt from the licensing jurisdiction of the [Commission]." Puget Sound Power & Light Co. v. Federal Power Comm'n, 557 F.2d 1311, 1316 (9th Cir. 1977). See also, e.g., Commonwealth Power Co., 39 FERC ¶ 62,043 (April 13, 1987); Connecticut Light and Power Co., 26 FERC ¶ 61,279 (March 2, 1984). The Project thus remains within the exception provided in Section 23 of the Act and the Commission lacks authority to interfere with its continued operation.

B. The Commission's Finding that the Project Is Not Required to Be Licensed Triggers the §23(b) Grant of Congressional Permission for the Unlicensed Operation of the Project

The Order on Jurisdiction is the functional equivalent of a Commission finding that §23(b) confers Congressional permission on Orange and Rockland to continue to operate the Project without a license under the Act. If the Commission had found that the Rio Project affected the interests of interstate commerce, it surely would have required the Project to be licensed. Thus, the finding in April 1987 that licensing is not required satisfies the statutory precondition to a grant of Congressional permission. This is consistent with the evolution of the delegation of Congressional authority to the Commission and the concomitant preservation of certain prerogatives of Congressional power.

In the early days of our nation, there was no federal regulation of activities which obstructed navigable waters. However, as the population grew and transportation technology developed, it became apparent that commerce by water, which was especially important before the development of the railroads, would be impeded by a patchwork of unregulated bridges, dams, piers and other obstructions.

In Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888), the Supreme Court found that in the absence of Congressional action, a State may authorize the erection of a bridge over navigable waters, even though the bridge obstructs navigation. Not surprisingly, Congress responded by adopting new legislation to regulate construction of obstructions to navigation, beginning with the River and Harbor Improvement Act of 1890[4/], which evolved into what is now commonly called the Rivers and Harbors Appropriation Act of 1899[5/], especially §9 and §10 thereof, codified at 33 U.S.C.A. §§401 and 403 (West 1986), respectively. Section 9 of the River and Harbor Act (33 U.S.C.A. §401 (West 1986)), requires the "consent of Congress" to construct any bridge or dam in any navigable water of the United States. Section 10 (33 U.S.C.A. §403 (West 1986)) requires a permit from the Corps of Engineers to construct other lesser obstructions to navigation, such as docks. Section 10, in effect, is a grant of Congressional consent to creation of the classes of obstructions identified therein -- so long as the Corps of Engineers permission is first obtained.[6/]

[4/] According to Kerwin, Federal Water Power Legislation, Columbia Univ. Press (1926) at p. 105, "The first general legislation on this subject is found in the rivers and harbors act of 1884, by which the Secretary of War was directed to report to Congress whether bridges crossing navigable streams ... were interfering with ... navigation" (hereinafter cited as "Kerwin").

[5/] March 3, 1899, c. 425, §9, 30 Stat. 1151.

[6/] The requirement of the Corps consent under §10 does not preempt state or local regulation (Cummings v. Chicago, 188 (continued...)

Upon enactment of the 1899 Act (and its predecessors), special permission by Act of Congress was required in order to develop new hydroelectric dams on navigable waters. These special acts of Congress granted "perpetual licenses for specific projects." *See*, *e.g.*, *Pacific Gas & Electric Co. v. FERC*, 720 F.2d 78, 83 (D.C. Cir. 1983). However, between 1900 and 1920, Congress gradually concluded that the time, political problems, and log-rolling associated with enactment of special legislation for individual projects created enormous problems.[7] For hydroelectric dams, the solution was to create a specialized Commission to consider and determine who should be allowed to develop new hydroelectric projects.[8] The Federal Water Power Commission was created for this purpose in 1920 by Section 1 of

---

[6] (...continued)
U.S. 410 (1903)). Similarly, a hydro project on a nonnavigable stream, operating with Congressional permission under §23(b), must be operated in accordance with State law.

[7] By the 1890s water power was a well-established source of mechanical energy to grind grain, saw timber, and drive manufacturing plants, and the use of water for these purposes was subject to state law. The potential for hydroelectric energy was rapidly becoming recognized, and there was considerable controversy over who would be permitted to use sites for hydroelectric development, and what conservation impacts would be tolerated. *See* Kerwin, Chapters III, "The Issue Comes to Light", and IV, "Congress Battles On", *passim*. The original legislation was motivated by Congress' interest in protecting navigation interests, and was expanded to incorporate "interstate commerce" interests only in the 1960s. *See* *Federal Power Comm'n v. Union Electric Co.*, 381 U.S. 90 (1965).

[8] Separate legislation was later enacted to authorize construction of bridges (*see* General Bridge Act, 33 U.S.C. §491 *et seq*. (West 1986)).

the Federal Power Act.[9] Not by coincidence, the first Commissioners were, by the terms of the Act, the Secretaries of War, Agriculture, and Interior, each of which under previous legislation had been responsible, in varying degrees, for recommending to Congress whether or not to authorize particular proposed new hydroelectric developments. The Act empowered the Water Power Commission to issue licenses under §4(d) [now §4(e)], and, under §23 made it "unlawful" for any person to construct and maintain projects on navigable waters without a license. However, previously authorized projects were allowed to continue under the terms of this prior authorization, though owners of such projects could voluntarily apply for licenses from the new Commission (see §23 [now §23(a)]). The Congressional permission granted under §23 [later §23(b)] was the permission required by the 1899 River and Harbor Act. Farmington River Power Co. v. F.P.C., 455 F.2d at 89.

Congress created the Federal Water Power Commission as its agent to license - or not to license - proposed projects not otherwise authorized. Section 23, as it was adopted in 1920, makes clear that Congress intended that it would be lawful to maintain projects authorized by Congress by permit or right-of-way before enactment of the Federal Water Power Act. Likewise, §23, as enacted in 1920, required no license for projects on non-navigable streams, although in 1935 the Act was amended to require that declarations of intention to license such projects be filed with the Commission.

---

[9] 16 U.S.C.A. §792 (West 1985).

Finally, any person who obtained the permission required to satisfy the 1899 Act, which constituted compliance with §23 of the Federal Power Act, is not vulnerable to involuntary revocation of that permission by the Commission or another proposed licensee.[10/]

Congress intended the 1920 Act to promote secure expectations in those who owned and operated hydroelectric projects. Pacific Gas & Electric Co. v. FERC, 720 F.2d 78, 83 (D.C. Cir. 1983); 59 Cong. Rec. 1440 (1920). Between 1920 and 1935, there was a well-settled understanding of Section 23(b) and its effect on the scope of Commission jurisdiction to require licenses. Congressional permission authorized a certain class of projects to be built and operated without interference.

This construction of Section 23(b) has been reiterated and reinforced by subsequent judicial interpretation of constraints on the Commission's licensing authority. The court in Farmington found that one who lawfully made no discretionary filing for a pre-1935 project enjoyed Congressional permission to maintain such an unlicensed project on a nonnavigable stream. 455 F.2d at 89. The decisions in Puget Sound made it clear that only post-1935 construction under §23(b) could give the

---

[10/] See also Scenic Hudson Preservation Conference v. Callaway 370 F. Supp. 162 (S.D.N.Y. 1973), aff'd, 499 F.2d 127 (2d Cir. 1974).

Commission licensing jurisdiction over the project. The court said:

> Since the mandatory filing and licensing requirements of Section 23(b) which give the [Commission] jurisdiction over hydroelectric projects are not retroactive to pre-1935 projects, the _only_ avenue left open to the [Commission] _to obtain_ jurisdiction over the . . . project is . . . post-1935 . . . "construction" of the project.

557 F.2d at 1315 (emphasis added).

Thus, Orange and Rockland is entitled to continue to operate the Rio Project, undisturbed, so long as it does not invoke the Commission's jurisdiction to require a license. The Commission may not assert jurisdiction over a project that remains exempt from the application of the licensing requirements of the Act by prior statutory provisions. In _Washington Water Power Co. v. F.E.R.C._, 775 F.2d 305 (D.C. Cir. 1985) the Washington Water Power Company possessed valid rights to construct, operate and maintain a hydroelectric project on the Spokane River under a Special Act of 1905 which pre-dated the Act of 1920. The authority of these rights was preserved in Section 23 of the Act, which excepted such projects from licensing jurisdiction of the Commission. _Id_. at 334. The D.C. Circuit Court of Appeals found that nothing had abrogated this exemption and that the project remained within the exceptions provided in the Act. _Id_. at 335, 336. Accordingly, the court held that the Act prohibited the Commission from construing the obligations of the Act retroactively to require subsequent licensing and, therefore, the company was not required to obtain a license in order to continue to operate and maintain the project. Id. at 336. The court said:

> The effect of the Commission's ruling [to require a license] would be to strip Washington Power of its valid right of way to operate and maintain the dam at Little Falls, and in effect to revoke that right. However, the applicable statutes the Commission relies upon recognize the continuing validity of any 'valid existing right-of-way,' FPA 23(b), and provide that they 'shall not be construed as affecting any permit or valid existing right of way . . . granted prior to June 10, 1920 . . . or as affecting any authority heretofore given pursuant to law.' FPA 23(a)....

775 F.2d at 325 (emphasis in original).

The issuance of a license to Rio Associates for the Project would clearly "affect" the lawful authority under which Orange and Rockland operates and maintains the Project, contrary to the express language of the Act. The court concluded:

> [S]ection 23 of the Federal Power Act prohibits the Commission from doing anything that would "affect" the rights so acquired . . . . Indeed, one can hardly avoid the impression that the Commission, determined to seize jurisdiction over the property of the Washington Water Power Company, simply decided not to let the expressed intent of Congress stand in its way. We cannot countenance such a gross misconstruction of the statute.
>
> [T]he continuous operation and maintenance of the . . . [d]evelopment . . . is exempted from the application of the Federal Power Act by sections 23(a) and (b), 16 U.S.C. §§816, 817, of said Act; . . . Commission . . . Orders pursuant thereto, are in violation of section 23 of the Federal Power Act, are invalid to the extent that they seek to require . . . a license for the . . . [d]evelopment.

Id. at 336.

The flaw in the Commission's Order, therefore, is obvious. The Commission's authority under §4(e) after 1935 to issue licenses is not pertinent to its authority to accept Rio Associates' license application. The question is not FERC's present-day authority in §4(e), but rather the extent of the pre-1935 Congressional grant of authority to project owners to operate on nonnavigable streams without a license from the Commission. Thus, whether one looks to the language of the Act, as applied in Farmington and Puget Sound, or to the Commission's Order on Jurisdiction, 39 FERC ¶ 62,028, it is evident that Orange and Rockland now has Congressional permission to operate the Project.

C. Section 4(e) Does Not Abrogate the Exception from Licensing Under §23(b) that Has Been Ratified by the Commission.

The Order contends that §4(e) of the Act empowers the Commission to revoke pre-existing Congressional consent, but this contention is flatly controverted by the plain language of §23(a) and §23(b), as clarified by the court in Farmington and Puget Sound. The Commission is barred from issuing a license to Rio Associates, or from even entertaining their license application, because the post-1935 terms of §4(e), which empowers the Commission to issue licenses to pre-1935 projects on nonnavigable streams, do not revoke the pre-1935 immunity of pre-1935 projects under §23(b). The Commission's assertion that

§4(e) in its post-1935 form is "broader" than §23(b) is, of course, correct, but inapplicable to this case. Such a notion both ignores the Congressional intent in §23(b) and compares (in apples and oranges fashion) the post-1935 §4(e) with the pre-1935 §23. Section 4(e) provides the Commission with general power to license projects within the jurisdiction of Congress under the Commerce Clause. Section 23(b) creates exceptions that, as explained in Farmington and Puget Sound, limit the Commission's powers in Section 4 of the Act.

The court's decision in Farmington with respect to the limitations imposed by §23(b) on the Commission's general licensing authority under §4(g), is on all fours with this case. The court said:

> Prior to 1935, the Commission had no authority to investigate projects in either navigable or nonnavigable waters, unless a declaration of intention to build had first been filed with it. Section 4(g) was added to increase the enforcement powers of the Commission. The legislative history makes quite clear, however, that this subsection was only designed to permit the Commission to proceed on its own, and it was not a general delegation of authority to require licenses apart from other statutory standards.

455 F.2d at 91 (footnote omitted). As the court's explanation of the legislative history of the Federal Power Act demonstrates, the Commission's licensing authority under §4(e) extends only to hydroelectric projects not otherwise authorized by Congress. See Farmington, and Puget Sound.

The disputed question in this Application for Rehearing is whether a non-owner may apply for a license for a lawfully operating pre-1935 project on nonnavigable waters, and whether, under the post-1935 terms of §23(b) and §4(e), the Commission may accept for filing an application to license such a project to a non-owner. If so, the lawfully operating owner can be ousted by a non-owner-licensee who invokes the power of eminent domain granted under §21 of the Act (16 U.S.C.A. §814 (West 1985)). In the Order, the Commission relies on its decision in Clifton Power, 39 FERC ¶ 61,117 (May 5, 1987) which asserts that such a lawful owner may, indeed, be ousted by a non-owner licensee. 39 FERC at p. 61,452. However, this assertion is bereft of supporting references to the statute or to judicial decisions, and, in fact, is dicta unnecessary to the Commission's decision in that case.

In any event, the reasoning of Clifton, is inapplicable to the instant case. In Clifton, the project owner was the license applicant. The Commission merely applied the principle that after 1935, a pre-1935 project owner could voluntarily seek and obtain a project license from the Commission.11/ This case is radically different, however, because the license applicant is the non-owner, and the Project owner objects. Under these circumstances, the Commission may not issue a license to the non-owner, and, in fact, may not accept a license application from a non-owner.

11/ See §23(a) of the Act (16 U.S.C.A. §816 (West 1985)).

II. RIO ASSOCIATES' PROPOSED NEW CONSTRUCTION DOES NOT AUTHORIZE THE COMMISSION TO ENTERTAIN ITS LICENSE APPLICATION

The Commission's Order further asserts (mimeo at p.4) that Rio Associates' application is acceptable because Rio Associates propose to construct new project works in order to increase the existing Project's generating capacity. Thus, the Commission apparently reasons that any person who proposes to add new capacity to a lawfully operating unlicensed project is entitled to become licensee of the entire project. Such reasoning is plainly flawed.

Rio Associates cannot confer on the Commission an authority that Congress has denied to it. Orange and Rockland has authority under Section 23 of the Act to operate the Rio Project. If this authority immunizes the Project against the Commission's jurisdiction to license, a fortiori it must also be effective against private efforts, which can only derive their authority from powers conferred on the Commission by the Act.

A person operating a hydroelectric project with Congressional permission under §23 stands in shoes comparable to those of a licensee, insofar as protection from ouster by a new licensee is concerned. That is, one initially licensed to operate an existing project is not subject to having a subsequent licensee authorized to condemn and take over the project, short of revocation pursuant to §6 of the Act (16 U.S.C.A. §799 (West 1985)).

The Commission's continued processing of Rio Associates' license application is nothing more than an attempt to impose a license indirectly where the Commission is prohibited from doing so directly. The Commission has itself determined that it cannot require Orange and Rockland to license the Rio Project. It cannot do so because Orange and Rockland already has a Congressionally granted, valid, preexisting and exclusive right to operate and maintain the Project. That exclusive right means that the Project cannot be licensed without Orange and Rockland's acquiescence.

The fact that the Commission cannot require Orange and Rockland to seek a license is instructive for another reason. If Orange and Rockland were required to seek a license, it would necessarily be exposed to the possibility that another applicant would successfully file a competing license application and take over the Project. This is inherent in the fact that a Commission-issued license is also an exclusive right that can only be conferred after the opportunity for a competitive proceeding.

If Orange and Rockland cannot be compelled to face this risk by being required to seek a license, then Orange and Rockland cannot nevertheless be forced to face the same risk merely because the Commission wishes to entertain a license application from someone else who has no colorable claim to the same Project. The Commission does not have the authority under the Act to abrogate the Congressional permission pursuant to which Orange and Rockland operates the Rio Project. It is, therefore, ludicrous to suggest that a mere private party seeking Commission approval has any greater power to terminate Orange and Rockland's rights.

Nor is it factually correct to suggest that Rio Associates propose a post-1935 modification of the Project sufficient to confer jurisdiction on the Commission. It is undisputed that Rio Associates' application proposes several minor modifications to the Project, notably the installation of a 500 KW minimum flow powerhouse. However, this will not increase the Project's head, generating capacity, or water storage capacity so as to constitute post-1935 construction under the Commission's jurisdiction.

In fact, Rio Associates' plans will reduce the Project's generating capacity and output. This result is hardly surprising. Rio Associates propose to take the flow for their proposed minimum flow turbine from the existing penstock. Although they would install generators with a total nameplate rating greater than the current Project nameplate ratings, there is no actual increase in generating capacity. Since any flow that is bypassed to the minimum flow turbine would not be available at the main powerhouse, 90 feet of head would be lost and total power generation would be reduced. As a result, the actual installed capacity of the Project would be effectively reduced because the water available for generation through the penstock is limited, and flows bypassed to the minimum flow turbine at the lower head can never again be utilized in the main powerhouse.

This physical reality is clearly demonstrated by comparing Rio Associates' draft application circulated for second stage consultation with the version filed with the Commission. In the second stage consultation draft, Rio Associates do not mention a minimum flow powerhouse. The Project's installed capacity is stated to be 11,000 KW (Draft App. at 7) and the output is stated to be 35,000 MWH (Draft App. at 11). In the final application filed with the Commission, Rio Associates indicate they will install a minimum flow powerhouse of 500 KW. Although the project's installed nameplate capacity is stated to have increased to 11,500 KW (App. at A-7 - A-8), the stated output has decreased to 31,000 MWH (App. at B-5). This last total also compares unfavorably to the recorded average annual plant output of 32,900 MWH substantiated (at p. 25) in Orange and Rockland's application for a preliminary permit. Application for Preliminary Permit for the Mongaup Hydroelectric Project, filed December 18, 1985.

Therefore, Rio Associates' proposal does not rise to the level of a jurisdictional modification of the Project's design or operation. The standards for a significant modification are set forth in a series of decisions of the courts and the Commission.12/

12/ Moreover, even if Rio Associates' proposal was a jurisdictional modification, Rio Associates, at most, could only seek a license on the modification, not the entire project.

An improvement or modification of the original project that merely increases the reliability of the water flow does not constitute post-1935 construction. The Commission recently found that "[r]econstruction of the diversion dam, 100 feet downstream from its original position in 1952, was to insure a continuous water supply to downstream users in Oroville and adjacent towns. This would not constitute Post-1935 construction." Pacific Gas and Electric Co., 32 FERC ¶ 62,094 at p. 63,087 (July 12, 1985).

Rio Associates' proposal, at most, constitutes mitigation of the effects of the Project on the environment by increasing the reliability of water flow to the bypassed stretch. Apparently, Rio Associates added the minimum flow powerhouse to its plan in response to agency comments. Initially, Rio Associates planned to take over the Project without making any changes. Rio Associates do not refer to any minimum flow powerhouse in their draft application submitted for second stage consultation. The agencies consulted insisted that the Project maintain a minimum flow through the stretch of river between the dam and powerhouse. Apparently, Rio Associates believed that a minimum flow powerhouse would be the most satisfactory way to assure a flow that could enhance fishery resources in a short downstream reach, and to recover some of the capacity lost to a minimum flow requirement, but not all of it. Moreover, Rio Associates do not suggest that the "powerhouse" will provide additional power for sale to Orange and Rockland, though Orange and Rockland is Rio Associates' intended purchaser for all of the power generated at the Project.

CONCLUSION

The language of Section 23(b) of the Act, as explained by the courts, clearly excepts the Rio Project from the licensing authority of the Commission. As the Commission conceded in its Order on Jurisdiction, the Rio Project does not meet any of the prerequisites for drawing it within the Commission's general authority to compel the licensing of hydroelectric projects. Moreover, Rio Associates proposes no construction that rises to the significance of post-1935 construction, within the meaning of Section 23(b). The Commission thus lacks authority to intrude on Orange and Rockland's right to operate the Project by licensing the Rio Project to Rio Associates.

Accordingly, Orange and Rockland respectfully requests that the Commission grant this application for rehearing and that the Commission enter an order dismissing the license application filed by Rio Associates.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

by:
G. S. Peter Bergen

520 Madison Avenue
New York, New York 10022
(212) 715-8000

Attorneys for
Orange and Rockland Utilities, Inc.

Of Counsel
Louis Rosenman
Thomas E. Mark
Harriet L. Moses

Dated: New York, New York
October 9, 1987

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each party designated on the official service list compiled by the Secretary in this proceeding.

Dated at New York, New York this 9th day of October, 1987.

Harriet Moses

Harriet L. Moses

44 FERC ¶ 61 236

EXHIBIT 4

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Martha O. Hesse, Chairman;
Charles G. Stalon and Charles A. Trabandt.

Orange and Rockland Utilities, Inc.)	Project No. 9690-003
Rio Hydroelectric Associates, Inc.)	Project No. 9754-002

ORDER DENYING REHEARING

(Issued August 5, 1988)

On September 11, 1987, the Commission issued an order which, inter alia, denied a motion by Orange and Rockland Utilities, Inc. (O&R) to dismiss the license application filed by Rio Hydroelectric Associates, Inc. (Rio Hydro) for the Rio Hydroelectric Project No. 9754, located on the Mongaup River in Orange and Sullivan Counties, New York, at the site of and utilizing the unlicensed Rio Project owned and operated by O&R. 1/ O&R had asserted that the order on jurisdiction issued April 6, 1987, 2/ by the Director, Office of Hydropower Licensing (Director), disclaimed Commission jurisdiction over the Rio Project. 3/

The Commission denied O&R's motion, because, while licensing of the Rio Project was not shown to be required under Section 23(b) of FPA, 4/ the Commission is nevertheless empowered to

---

1/ Orange and Rockland Utilities, Inc., 40 FERC ¶ 61,222 (1987).

2/ 39 FERC ¶ 62,028 (1987).

3/ As will be discussed below, the Director's order did not disclaim Commission jurisdiction over the Rio Project (one of three unlicensed hydroelectric projects of O&R on the Mongaup River), but only determined that licensing of the Rio Project (and one of the other two projects) was not shown to be required under Section 23(b) of the Federal Power Act (FPA), 16 U.S.C. § 817.

4/ Section 6 of Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, amended Section 23(b) by redesignating the prior Section 23(b) as Section 23(b)(1) and adding a new Section 23(b)(2), not here pertinent. For the purposes of this discussion, we will refer to Section 23(b)(1) as Section 23(b).

issue a license for the Rio Project under the broader Section 4(e) of the FPA. 5/ The Commission cited Clifton Power Corp., 39 FERC ¶ 61,117 (1987), which was later affirmed by Cooley v. FERC, 843 F.2d 1164 (D.C. Cir. 1988). The Commission also found that the project proposed by Rio Hydro would in fact be required to be licensed under Section 23(b), because the proposal included new project works increasing the existing project's generating capacity.

On October 9, 1987, O&R filed a timely request for rehearing of that portion of the Commission's order denying its motion to dismiss Rio Hydro's license application. Although O&R states its arguments in various ways, 6/ the thrust of the arguments is that, because its Rio Project was built prior to 1935, and no declaration of intention needed to be filed or was filed prior to construction, it is exempted from the licensing requirement of Section 23 of the FPA, and that therefore the Commission cannot consider Rio Hydro's application to license the enlarged Rio Project No. 9754. O&R also argues that Rio Hydro's proposed addition of a 500-kW minimum flow powerhouse will not in fact increase the generating capacity of the project or otherwise make licensing required under Section 23(b).

5/ 16 U.S.C. § 797(e).

6/ The request for rehearing (at 5) asserts that the denial of the motion to dismiss is flawed because: (1) Section 4(e) provides the Commission no authority here, because its application to the Rio Project is barred by Section 23(b), which is an express limitation on the Section 4(e) authority; (2) Rio Associates actually plan to decrease the project's capacity; and (3) Clifton cannot be extrapolated to this case in which a non-owner seeks to license a lawfully operated unlicensed project owned by someone else. The structure of its arguments consists of two main points: (1) The Rio Project is not required to be licensed under Section 23(b), and Section 4(e) does not empower the Commission to revoke that exception (rehearing at 6); and (2) Rio Hydro's proposed new construction does not authorize the Commission to entertain Rio Hydro's application (rehearing, at 19). The first main point consists of three sub-arguments: (1) the Rio Project enjoys a statutory exemption from the licensing requirements of the FPA; (2) the Commission's finding that O&R's project is not required to be licensed triggers the Section 23(b) grant of congressional permission for the unlicensed operation of the project; and (3) Section 4(e) does not abrogate the exemption from licensing under Section 23(b) that has been ratified by the Commission.

O&R's rehearing request states that for the first time in the history of the FPA the Commission is contemplating issuing a license for an operating hydroelectric project, with no post-1935 construction, to an entity with no ownership interest in the project. The case appears to be one of first impression. We are aware of no prior articulation of precedent in a case where one entity seeks a license for an unlicensed, operating hydroelectric project over the objection of the owner-operator of the project, although there have been situations where an owner of property, even of an existing dam, needed for a hydroelectric project has objected to some aspect of the issuance of a license to a non-owner of the property. That the situation has finally been presented is not altogether surprising, however, in view of the greatly increased interest in hydroelectric development which has occurred over the last decade. See Clifton and, in particular, the discussion, 39 FERC at 61,452. 7/

We emphasize that the sole question before the Commission at this time is whether Rio Hydro's application should be summarily dismissed, as urged by O&R in its earlier motion and now on rehearing. In denying rehearing, we express no opinion on the merits of Rio Hydro's application or on our ultimate disposition of that application. Nor are we now ruling on a separate motion by O&R, filed on July 12, 1988, to dismiss Rio Hydro's application on the asserted basis of failure to demonstrate economic feasibility; that motion will be considered separately.

Discussion

Pertinent statutory provisions are found in Sections 4(e) and 23 of the FPA. Section 4(e), as amended in 1935, authorizes the Commission to issue licenses for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, powerhouses, or other project works, including, among others, those across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states (Commerce Clause waters).

7/ Two other proceedings now before the Commission, Inghams Corp., Project No. 9711-000, and Beardslee Corp., Project No. 9712-000, raise a closely related question, one which concerns preliminary permit applications (as distinguished from license applications) to study the feasibility of developing the currently unutilized capacity at an unlicensed, operating hydroelectric project owned by an entity which is not the preliminary permit applicant.

Section 23 was also amended in 1935 8/ to require prospectively, in newly designated subsection (b), the filing of declarations of intention to construct project works across, along, over, or in a non-navigable Commerce Clause water. If the Commission determines that the interests of interstate or foreign commerce would be affected by such proposed construction, then such project works cannot be constructed, maintained, or operated until an FPA license is issued therefor. This amendment to Section 23 was prospective only; therefore, projects located on non-navigable Commerce Clause waters that were constructed prior to 1935, and did not have post-1935 construction, were not required by Section 23(b) to obtain a license. See Farmington River Power Co. v. Federal Power Commission, 455 F.2d 86 (2nd Cir. 1972). However, since the Commission's authority, under Section 4(e), to license a project encompasses all projects located on Commerce Clause waters, whether or not they are found to affect interstate commerce, the Commission may issue a license voluntarily sought for a project not required to be licensed. Clifton, affirmed by Cooley.

Section 23(b), in its first sentence as added by the 1935 amendments, makes it unlawful to construct, operate, or maintain project works across, along, or in any of the navigable waters of the United States "except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act." The prohibitory language also applies to works which are upon any part of the public lands or reservations of the United States or utilize the surplus water or water power from any government dam.

Section 23(a) of the FPA provides in pertinent part: 9/

> The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application the Commission may

---

8/ For a more complete discussion of the 1935 amendments to Section 4(e) and this part of Section 23(b), see Clifton and Cooley.

9/ 16 U.S.C. § 816. The subsection also provides for the issuance of "fair value" licenses when the subsection applies, and when a license is issued pursuant to its provisions.

> issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder ... .

O&R, whose rehearing request in this proceeding was filed before the opinion in Cooley issued, argues that Clifton is in any event inapplicable to this case, since Clifton involved the owner of a pre-1935 project on a non-navigable Commerce Clause water voluntarily seeking a license for its own project. By contrast, here a third party, Rio Hydro, seeks to obtain a license for a pre-1935 project owned and operated by O&R on a non-navigable Commerce Clause water.

O&R argues that, where the Commission lacks the authority under Section 23(b) to require a project owner to obtain a license, the Commission also lacks the authority under Section 4(e) to issue a license for such project to anyone else. O&R cites Farmington for this proposition. However, the only issue before the court in that case was whether the Commission could require a license for a pre-1935 project on Commerce Clause waters. The court did not address the issue of a voluntary license application by other than the project owner, although it "apparently assumed that Congress did in fact grant the Commission the power to grant, but not require, licenses" for such projects. Cooley, 843 F.2d at 1468 n.9, referring to Farmington, 455 F.2d at 89.

Furthermore, the court in Cooley made specific reference to the instant proceeding and to the issue now before us. 10/

> [A]ccording to Cooley, the power claimed under the Commission's new reading of § 4(e) puts pre-1935 project owners at risk because volunteer applicants need not be project owners. Thus, the owner of a project not requiring a license may find himself the target of a license application by strangers. Of course, even if true, nothing prevents the current owner-operator from opposing such an application or filing a competing application; 15/ the Commission must still address all such applications in terms of its public interest standard. 16/ Finally, despite a similar theoretical threat to pre-1935 project owner-operators from nonowner applicants proposing improvements involving

---

10/ 843 F.2d at 1470-71.

> new construction, there is no cited evidence of massive abuses; before the Commission claimed § 4(e) voluntary license authority, an aggressive stranger could threaten an unlicensed owner-operator by applying for a license under § 23(b) involving post-1935 construction improvements. Indeed, one would suppose that such an applicant proposing beneficial modifications would stand a better chance of getting a license than would Cooley's hypothetical interloper who does not propose any substantial improvements, but merely seeks the FERC's aid in wresting control of a plant from the current operator. Thus, the Commission's interpretation in this case does not create a new or irreconcilable conflict in FERC's regulatory structure.
>
> ---
>
> 15/ The Commission has also agreed to waive its normal first-in-time rules, 18 C.F.R. § 4.37 (1987), in cases in which nonowner applicants seek licenses before the owners themselves apply. [Citation omitted.]
>
> 16/ This is, therefore, not a case in which the Commission is doing indirectly something which it cannot do directly. [11/] No license may be granted if it is not in the public interest to do so. Moreover, it is not the Commission which creates pressures on an owner-operator to file its own application or resist that of another, but rather the competing applicant. For example, in Orange [and] Rockland Utilities, Inc., 40 F.E.R.C ¶ 61,222 (1987), the Commission relied on its Clifton interpretation of § 4(e) to deny a motion to dismiss competing license applications for two projects, and it will now determine on the merits which potential licensee will best serve the public interest.

O&R's argument also is that the lack of a licensing requirement for its project under Section 23(b) in essence

---

11/ O&R so argues in its rehearing request at 20.

constitutes a permission which, under the terms of Sections 23(a), 23(b), or the Director's determination that licensing is not shown to be required by Section 23(b), gives O&R's project perpetual immunity from the Commission's licensing authority, unless O&R itself voluntarily seeks a license for the project (or proposes construction that would require licensing under Section 23(b)).

Thus, with respect to Section 23(a), if O&R's argument that it in essence holds a pre-1920 permit is correct, the Commission would not be empowered to issue a license for O&R's project to anyone else, since such action would "affect" O&R's pre-1920 permit and would therefore be barred by the terms of Section 23(a).

O&R's theory is novel but unpersuasive. Sections 23(a) and 23(b) refer to permits or valid existing rights-of-way granted prior to June 10, 1920, the date the Federal Water Power Act (redesignated in 1935 as Part I of the FPA) was enacted. However, O&R acknowledges that its Rio Project was not constructed until 1927. 12/ The pre-1920 permits are those which the Secretaries of War, Agriculture, and the Interior were, prior to enactment of the Federal Water Power Act, authorized to issue for water power projects. 13/ A 1921 opinion of the Attorney General determined that enactment of the Federal Water Power Act concentrated in the predecessor Federal Power Commission all the administrative authority over future water power development which was in part previously distributed among the Secretaries of the Interior, Agriculture, and War. 14/ Thus, while "Congress

---

12/ O&R's rehearing request at 1.

13/ See, e.g., Seventh Annual Report of the Federal Power Commission 142 (1927), referring, among other things, to the legislative history of the Federal Water Power Act, and quoting particularly 58 Cong. Rec. 2242 (1919). See also Id. at 154-56, 161-82.

14/ 32 Op. Att'y Gen. 525 (1921). This opinion, which concerned the lack of Secretarial authority for the post-1920 assignment of water power permits affecting national forest lands, states, in part, at 528:

> It seems clear that it was the purpose of Congress to bring under this Act all future power development within the jurisdiction of the United States and to concentrate in the hands of the Federal Power Commission all the administrative authority thereover

(continued...)

... explicitly authorized the Commission to issue new licenses and void prior permits where the operators of previously authorized pre-1920 projects chose to waive vested rights [15/] in return for a new Commission license[,] [p]reviously unlicensed 1920-1935 projects on the other hand hold no similar permits or rights that would require explicit authorization to override them." Cooley, 843 F.2d at 1470.

With respect to Section 23(b) and the Director's determination that under Section 23(b) licensing is not shown to be required for O&R's Rio Project, O&R's argument, that it holds some permission which renders its project immune from any licensing authority under the FPA, is also flawed and relies on

---

14/(...continued)

> which was in part previously distributed among the Secretaries of the Interior, Agriculture, and War. It is also clear that no further original permits, at least, were thereafter to be issued by the Secretaries. It is believed that practically all the permits issued by them are limited in time; and when they expire new licenses will be issued by the Commission and not by the Secretaries, respectively. It is therefore evident that the intent of the Act, as well as its necessary operation, is to ultimately bring under the new law and under the control of the Federal Power Commission all existing as well as all future developments.
>
> The Federal Water Power Act further shows a purpose to hasten this result by providing, in section 23, that holders of old permits may voluntarily surrender the same and receive from the Commission new licenses under the new Act.

15/ See, for example, the pre-1920 permit for the project at issue in Washington Water Power Co. v. FERC, 775 F.2d 305 (D.C. Cir. 1985), cited by O&R. The court noted that the project owner's rights to construct its project "were acquired under [a special act of Congress approved on March 3, 1905] and Washington Law and are property rights under that law." 775 F.2d at 326. Pursuant to the 1905 special act, the Secretary of the Interior had granted a permit or right-of-way. Id. at 310. The project owner's right-of-way was "a limited fee with implied reverter for non-use." Id. at 325.

an unduly restrictive interpretation of the pertinent legal and factual background. 16/

O&R argues that in the circumstances where Commission authority to require licensing of a project has not been shown, "Congress expressly granted permission to construct the project, subject only to the requirements of State law," presumably referring to the last sentence of Section 23(b). 17/

16/ Since 1920, congressional consent to construct a dam for a hydroelectric project is obtained exclusively pursuant to licenses issued by the Commission. In First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 150, 180 (1946), the Court described the Federal Water Power Act of 1920 as

> ... the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

See also Scenic Hudson Preservation Conference v. Callaway, 370 F. Supp. 162, 164-68 (S.D. N.Y. 1973), *aff'd*, 499 F.2d 127 (2nd Cir. 1974). Also, "'[s]tatutes said to restrict the power of the government by the creation of private rights are, like other public grants, to be strictly construed for the protection of the public interest.'" Northwest Paper Co. v. Federal Power Commission, 344 F.2d 47, 51 (8th Cir. 1965), *citing* Reichelderfer v. Quinn, 287 U.S. 315, 321 (1932). *See also* Nantahala Power and Light Co. v. Federal Power Commission, 384 F.2d 200 (4th Cir. 1967), with respect to other assertions of indefeasible immunity from the Commission's licensing authority.

17/ O&R's rehearing request at 7. *See also* p.9, where O&R extends its argument:

> The Order on Jurisdiction is the functional equivalent of a Commission finding that § 23(b) confers Congressional permission on Orange and Rockland to continue to *operate* the Project without a license under the Act. If the
> (continued...)

The sentence reads:

> If the Commission shall not so find, ... permission is hereby granted to construct such dam or other project works in such stream upon compliance with state laws.

The language "shall not so find" refers to the Commission's finding whether the proposed construction would affect the interests of interstate or foreign commerce, which finding is to be made following the filing of a declaration of intention of proposed construction. Prior to the 1935 amendments, the filing of declarations of intention to construct was discretionary; with the 1935 amendments, the filing of declarations of intention became mandatory.

At the outset, O&R's reliance on the last sentence of Section 23(b) is, for its purposes, unwarranted. The effect of the sentence, which is a part of the prohibitions of Section 23(b), does not support its argument. Its argument seems to be not just that it was not required to secure a license prior to construction but rather that, because it was not required to secure a license prior to construction, it was not only free to construct without a license, but it also was and is free to perpetually continue to operate and maintain the project without a license, so that the Commission cannot even entertain a later license application by a qualified applicant for a proposed project which would utilize the same site.

In *Nantahala* the court was faced with arguments respecting the import of Section 23(b), particularly the last sentence. While in *Nantahala* the underlying question before the court was somewhat different than the question before the Commission in this proceeding, 18/ the views of the *Nantahala* court on the

---

> 17/(...continued)
> Commission had found that the Rio Project affected the interests of interstate commerce, it surely would have required the Project to be licensed. Thus, the finding in April 1987 that licensing is not required satisfies the statutory precondition to a grant of Congressional permission. [Emphasis added.]

18/ In *Nantahala*, the underlying question decided affirmatively by the court was whether the Commission, once having made the full Section 23(b) finding that licensing was not required because of a lack of effect of the project on the interests of interstate or foreign commerce, could later
(continued...)

interpretation of Section 23 are nonetheless instructive here. There, the court stated, 384 F.2d at 206:

> It requires no subtle straining to arrive at a more sensible interpretation of section 23, in light of the history and purpose of the Act. Our view can be succinctly stated in the following propositions:
>
> (1) Once a finding of lack of effect on commerce is made, section 23 (b) authorizes the developer to construct the facility without a license.
>
> (2) Construction having been completed, the Commission is without authority later to say that the finding of lack of effect on commerce was in error and that therefore the developer violated the law by failing to obtain a license.
>
> (3) As long as the Commission adheres to the view that the development has no effect on commerce, license-free maintenance and operation of the facility is authorized.
>
> (4) When, however, the Commission determines that a change in the underlying facts, or a correct exposition of applicable law, discloses that the facility does affect commerce, continued maintenance and operation is conditioned upon the procurement of a license.
>
> Once the development is found to affect commerce, no grant of immunity from licensing can fairly be implied for maintenance and operation, as well as construction.

18/(...continued)
determine, to the contrary, that licensing was required for the continued operation and maintenance of the project because of such effect. In the words of the court, 384 F.2d at 203, the petitioner's principal contention was "that a Commission finding under Section 23(b) that a proposed facility would not affect commerce clothes the developer with irrevocable permission to construct and operate the development, without his ever needing to apply for and obtain a license." Of course, in this proceeding, O&R's argument is even weaker, because, as will be discussed below, the Commission here has never had occasion to make the full Section 23(b) finding, because O&R never filed a declaration of intention under Section 23 prior to proposed construction.

Thus the effect of the last sentence of Section 23(b), when it properly applies, is considerably less than O&R argues in this proceeding.

Additionally, it would seem that O&R's argument, that, because of Section 23(b), it "is entitled to continue to operate the Rio Project, undisturbed, so long as it does not invoke the Commission's jurisdiction to require a license," 19/ is essentially an attempt to equate the effect of the last sentence of Section 23(b) to the effect of Section 23(a). As discussed above, Section 23(a) does not apply here. There is, moreover, no basis for the attempted equation; the wording and the context of Sections 23(a) and 23(b) within the overall purpose of the FPA are quite different. Further, such an equation would violate established principles respecting construction of congressional grants of special franchises and privileges. 20/

As a final point with respect to O&R's arguments regarding Section 23(b) and the Director's determination, 21/ O&R's assertion, that "[i]f the Commission had found that the Rio Project affected the interests of interstate commerce, it surely would have required the Project to be licensed," 22/ is unwarranted. The Director's determination 23/ made no finding with respect to the effect of the Rio Project on the interests of interstate or foreign commerce. But the reason for this was the Director's determination that no post-1935 construction had occurred for the Rio Project, and thus, under Farmington, there was no occasion and no need for the finding. However, the lack of the finding should not be inferred to mean that O&R's Rio Project does not affect the interests of interstate commerce. Indeed, a finding of effect on the interests of interstate commerce is the appropriate finding. The Director's determination found that O&R operates an interstate electric system; O&R

19/ O&R's rehearing request at 14, under its sub-argument, at 9, that the finding that the project is not required to be licensed triggers the Section 23(b) grant of congressional permission for the unlicensed operation of the project.

20/ E.g., n. 16, supra, and Nantahala, 384 F.2d at 209, quoting from Louisville Bridge Co. v. U.S., 242 U.S. 409 at 417-18 (1917).

21/ O&R's arguments are, of course, also at odds with the language of Cooley quoted above.

22/ O&R's rehearing request at 9.

23/ 39 FERC ¶ 62,028 (1987).

operates generation and transmission facilities in New York and transmits power to its subsidiary companies in New Jersey and Pennsylvania. For the one development of the three on the Mongaup River found to have post-1935 construction, the Swinging Bridge development, the Director's order determined that the interests of commerce are affected. O&R's rehearing request at 3 acknowledges that the output of its Rio Project enters the interstate electric grid. See also Clifton, 39 FERC ¶ 61,117 at 61,452-55.

We now turn to the second main point in O&R's rehearing request, at 19, that Rio Hydro's proposed new construction does not authorize the Commission to entertain its license application.

The first part of its argument on its second main point is basically a reassertion of its earlier arguments that it already has "a congressionally granted, valid, preexisting and exclusive right to operate and maintain [its Rio] project." 24/ Those earlier arguments are, we think, sufficiently answered above. O&R does make one new assertion here, 25/ that, under Section 23, it "stands in shoes comparable to those of a licensee, insofar as protection from ouster by a new licensee is concerned," referring to Section 6 of the FPA. 26/ It is true that licensees under the FPA do have the protection afforded by Section 6 with respect to the project covered by the outstanding license. E.g., Gas & Electric Dept. v. FERC, 629 F.2d 197, 203 (1st CA 1980). The simple answer to O&R's assertion, however, is that it does not have a license under the FPA, and thus it does not have the protection afforded by Section 6. O&R may, of course, file an application for a license for the Rio Project. 27/

24/ O&R's rehearing request at 20.

25/ O&R's rehearing request at 19.

26/ 16 U.S.C. § 799.

27/ Pursuant to the Commission's order on which rehearing is requested, O&R has until October 6, 1988, to file a license application for the Rio Project. As noted in Clifton and in the language from Cooley quoted above, the normal first-in-time rules will not apply with respect to the competing applications. Regardless of whether or not O&R chooses to file a competing application or to oppose Rio Hydro's application on its merits, the Commission must still address the applications before it in terms of the required public interest standards, and particularly Section 10 of the FPA,
(continued...)

With respect to its second main point, O&R also argues that the new construction which Rio Hydro proposes does not constitute post-1935 construction within the meaning of Section 23(b). Thus, O&R challenges the Commission's finding that the project proposed by Rio Hydro would be required to be licensed for construction, operation, and maintenance of that proposed project.

The major features of new construction of project works proposed by Rio Hydro consist of a Wye branch connection to the existing penstock just downstream of the intake area; a 3.5-foot diameter penstock from the connection to the new powerhouse; the new powerhouse, about 90 feet below the dam, containing a new 500-kW generating unit; and a tailrace to discharge into the Mongaup River. Rio Hydro has not proposed any enlargement of the existing dam or the existing powerhouse now operated by O&R.

O&R acknowledges the proposed construction of the facilities for the new powerhouse and the resulting increase in the installed nameplate generating capacity of Rio Hydro's project. O&R also acknowledges that Rio Hydro's proposed new powerhouse will discharge into the river just below the dam and thus mitigate the environmental effects of the existing project by that addition of flow to the stretch of the stream bypassed by the existing project.

O&R argues, however, that because of the lesser amount of head at the proposed new powerhouse, as compared to the existing powerhouse, Rio Hydro's proposal will produce less energy than the existing project. 28/ O&R concludes that Rio Hydro's proposal does not constitute a significant modification or addition to the pre-1935 design or operation of the Rio Project, so that Rio Hydro's proposal would, according to O&R, not require licensing under Section 23(b).

Accepting, for the purposes of this order, O&R's contention that Rio Hydro's proposal will produce a decrease in energy generation in the order of magnitude argued by O&R on rehearing, we still believe our earlier conclusion to be correct on the basis of the record now developed. The construction of the new project works, including the new powerhouse with a hydraulic

---

27/(...continued)
16 U.S.C. § 803, as amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, approved October 16, 1986.

28/ O&R refers to Rio Hydro's draft and filed applications to support its arguments.

capability of 75 cfs (cubic feet per second), will significantly alter the operation of the project. In terms of environmental considerations, the impact of the modified operation also appears significant. 29/ The 500-kW of generating capacity is not, percentage-wise, a very large addition to an existing 10,000-kW project. It is, however, a substantial addition. Further, the Commission licenses many projects with a total installed capacity of 500 kW, or less. We therefore adhere to our earlier conclusion. It still appears, on the basis of the record now developed, that Rio Hydro's proposed project requires licensing under the FPA. 30/

Accordingly, for the reasons discussed above, O&R's rehearing request should be denied.

29/ O&R's rehearing request at 23 indicates that the proposal for the new powerhouse to discharge into the stretch of river now bypassed came about at the insistence of environmental agencies, apparently as a result of the consultation requirements of the Commission's regulations, 18 C.F.R. § 4.38 (1987).

30/ O&R's rehearing request at 22 n.12 urges that, even if Rio Hydro's proposal is one that requires licensing under Section 23(b), Rio Hydro could at most only seek a license for the proposed modifications or additions, not for the entire Rio Project with the modifications or additions. We believe the question of the scope of any license issued to Rio Hydro, if any such license should be issued, should be deferred until consideration of the application on its merits. This seems particularly appropriate inasmuch as O&R has until October 6, 1988, to file a license application for the Rio Project. However, we invite the parties' attention to the fact that the FPA's licensing provisions comprehend complete units of development. While the various features of a single unit of development may in some circumstances be under different licenses, the key point is that all features of a complete unit of development, a project, must be under Commission license, to enable regulation of the project under the comprehensive development standards of the FPA. See, e.g., Ada County, 27 FERC ¶ 61,285, n.n. 11-15 and accompanying text (1984).

The Commission orders:

Orange and Rockland Utilities, Inc.'s request for rehearing of ordering paragraph (A) of the Commission's September 11, 1987 order in this proceeding is denied.

By the Commission.

(S E A L)

Lois D. Cashell
Lois D. Cashell,
Acting Secretary.

Senator **Bradley**. I would like to clarify before we go to the other witnesses, could you tell me once more how the Rio Associates can acquire the Rio Project and then sell back power to Orange and Rockland at avoided cost? How is that possible?

Mr. **Roque**. If Rio Associates were to obtain a license from FERC, they would be considered a qualified facility under PURPA, and they would be able to do two things: Under the Federal Power Act, they would have the right of condemnation. They would be able to condemn the Project, take it away from O&R, and under PURPA as a qualified facility they could sell the power back to O&R at avoided cost.

Now, I should point out that Orange and Rockland burns oil as a fuel and its power plants, and Orange and Rockland's oil is priced at OPEC oil prices. They would in effect be selling us back water power at OPEC oil prices.

Senator **Bradley**. And the value of what they condemned would be what?

Mr. **Roque**. That would be subject to court litigation. We certainly have a position that we would be entitled to fair market value, and we would argue what that would be.

Senator **Bradley**. And they would argue what, depreciated value?

Mr. **Roque**. They would argue depreciated value and very low cost. We would obviously take——

Senator **Bradley**. It is conceivable they could take it at depreciated value and then sell you the power back at whatever the OPEC oil price is on equivalent kilowatt?

Mr. **Roque**. That is conceivable.

Senator **Bradley**. That is fairly clear.

Mr. Turner.

STATEMENT OF JOHN M. TURNER, DIRECTOR, GOVERNMENT AFFAIRS, GEORGIA-PACIFIC CORP.

Mr. **Turner**. Mr. Chairman and members of the committee, my name is John Turner. I am Director of Government Affairs for Georgia-Pacific Corporation, and I am appearing today before the subcommittee on behalf of the American Paper Institute, which is a national trade association composed of 170 member companies that produce collectively over 90 percent of the Nation's pulp, paper and paper board.

As an industry, we are naturally very interested in the takeover of nonjurisdictional unlicensed hydro projects because companies in the paper industry have historically located their facilities near major waterways, and the resources of these waterways have long been used in the manufacture of our pulp and paper products. In fact, some of the oldest hydroelectric projects in existence were originally hydromechanical projects providing power for timber and papermills owned by API members.

The paper industry represents one of the Nation's largest, if not the largest, group of non-utility project owners, with almost 100 facilities. About 25 to 30 of these are facilities that predate 1935 projects and historically are not subject to FERC's licensing jurisdiction because they were grandfathered by the 1935 Federal Power Act.

It is precisely this grandfathered right that endangers the ownership of these projects today.

Outside parties or claim jumpers can voluntarily place themselves under the Federal Energy Regulatory Commission's authority by filing for a license under section 4(e) of the Federal Power Act, or they can seek a license under section 23(b) by proposing new construction such as adding a turbine or increasing the height of the existing dam.

We do not believe it was Congress' intent that owners of pre-1935 projects should live in fear of losing their projects or having to go through the time and significant expense of licensing competition with only the chance that they would be able to retain those projects which often are an integral part of the manufacturing bill.

This committee certainly knows well the importance of hydro power to the nation and to regions. I would, however, like to give you just one example of its importance to my company's operation, and Georgia-Pacific, by the way, operates three hydro projects in the Northeast. Senator Bradley, one of our API member companies, James River, has two 1920 vintage dams, with their paper facilities located in Millford.

I wanted to specifically mention Georgia-Pacific's Woodland, Maine operation where we have two unlicensed hydroelectric projects located on the St. Croix River, with a combined annual capacity of 18 megawatts of power. One was built in 1905 and the other in 1914. The mill itself requires 30 megawatts of electric power. So in an average year, these two dams would provide one-third of our power needs—20 percent during the summer months and as high as 50 percent during the four months of the winter.

And equally important to the hydro is the impoundment of water behind those dams that serves our mill as a process water base.

Last year we sought and received from FERC a ruling that the dams did not require licensing under section 23(b) of the Federal Power Act. Under current law, however, these projects are vulnerable to takeover by any potential claim jumper who would seek a license from FERC. GP would then have to spend a great deal of time and money, without any guarantee whatsoever that the company would be able to retain the ownership and operation of these dams that had been in our possession and our predecessor companies for 75-plus years.

Needless to say, these dams are critically important to the operation of the Woodland Mill. Without the hydroelectric power that we now have available from them, we estimate that we would have to build a new power boiler with associate electric generating units that would be in the cost range, we estimate today in terms of dollars, in excess of $70 million, obviously increasing air and water mission potential as well.

This legislation before this subcommittee today would eliminate what we feel is an irrational and inequitable possibility.

The paper industry is also concerned about this issue as a role of a major consumer of electric power. We estimate that we are the third largest industrial consumer of electric power, with purchases last year alone placed at $2.2 billion. Our mills are predominantly located in areas of the Nation with the greatest hydroelectric capacity. Should utility electric rates increase due to takeover of our projects, the paper industry would suffer and certainly those smaller operations which have the least capacity to self-generate electric power would be damaged the most.

In cases where an outside party seeks to take over an unlicensed facility by proposing to increase its capacity, there is no assurance that this claim-jumper would have the financing to accomplish those purposes, and certainly there is no assurance that they would be able to succeed.

And it would be most absurd, for example, if they were to receive a license, fail to perform and then move on to the street to peddle in hopes that FERC would grant approval for a second transfer or, alternatively, the license might simply be abandoned.

Many of API's members with unlicensed projects are small, one-to-two mill companies, family businesses in many cases. They do not have necessarily the resources of a company like Georgia-Pacific to spend the hundreds of thousands of dollars in licensing competition, pre-filing consultation, legal fees and engineering studies. They built these projects many years ago, have operated them successfully, safely, in the public interest, have provided jobs and, in many instances, electric power to their communities, and they deserve a right to be able to keep these projects that they have had for 85 years or more.

For these reasons, the American Paper Institute supports enactment of S. 635.

I appreciate the opportunity to come before this group and make this statement.

Senator **Bradley**. Thank you very much, Mr. Turner.

Mr. Echeverria.

STATEMENT OF JOHN D. ECHEVERRIA, GENERAL COUNSEL, AMERICAN RIVERS

Mr. **Echeverria**. Thank you, Mr. Chairman. I am the General Counsel of American Rivers, the Nation's principal river conservation organization of 11,000 members around the country. I am here today testifying not only on behalf of American Rivers but also on behalf of the National Wildlife Federation, National Audubon Society, Environmental Policy Institute, and Friends of the Earth.

I would like to acknowledge the assistance of David Conrad of National Wildlife Federation in co-authoring these comments.

Conservation organizations oppose the enactment of S. 635 as drafted. While we believe the essential objective of the bill to protect consumers from unjustified rate increases due solely to changes in hydroelectric project ownership is sound, the proposed legislation sweeps far too broadly.

I have a prepared statement which I have provided to the committee staff. Since I seem to be swimming upstream against the current, I thought it might be most useful to give a brief summary of the highlights of my testimony and respond to some of the comments and points that have been made by the senators and some of the witnesses.

Senator **Bradley**. That would be good. I think that is advisable.

Mr. **Echeverria**. Thank you. First and most importantly, we believe that the bill addresses a problem and a problem that needs to be corrected. Mr. Chairman, you referred to this as the gaming of the regulatory system, and we certainly would oppose any scheme under which a third party could come in and take a depreciated utility asset and then sell the power back to the utility at a higher cost, making unreasonable profits and gouging consumers. We think that to the extent that the Orange and Rockland Project presents such a case, there is a problem that needs to be addressed.

We are also sympathetic to Mr. Roque's comment. We should enlist him as a conservationist. His criticism of the effects of PURPA and 20 percent tax credits sound very much like the criticisms that the National Wildlife Federation, American Rivers and others have launched against the tax provisions in PURPA.

Our concern is that in trying to address that problem, legislation will go too far. First, I think it is important in terms of background to recognize that, while we are dealing with a narrow area of the Federal Power Act, the general rules here favor competition and favor limited licenses. Most existing hydroelectric projects were subject to a rigorous competitive process. ECPA, enacted in 1986, made clear that the new license after the expiration of an original license is supposed to be issued to the applicant was a proposal that is best adapted to serve the public interest, subject to a no-insignificant differences test. Licenses are issued for 50 years—for a maximum of 50 years.

The other point I think is worth emphasizing is that claim-jumping, although it is a perjorative way of characterizing it, is the norm in this business. Existing dams not used for hydro purposes can be filed on by a hydro applicant in order to develop a hydro potential. Federal water projects that have unexploited hydroelectric potential can be developed by private developers. Although there is some question about it, it appears as well that existing non-Federal hydro projects can be the object of a filing by an applicant who seeks to add incremental capacity.

So it is against that framework that I think we are looking at a very narrow set of projects in which the proposal is to say there will be no competition. The person who is there now will have the right, if they never file a license application, to hold on to the project forever. And if this bill were enacted, it is hard to imagine why any owner of a project would ever voluntarily file an application.

And that, as I emphasize, is completely contrary to the way in which Congress has handled all other existing hydroelectric projects, many of which are as old or older than the projects that are the subject of this bill.

In terms of the question of whether or not the bill, the present regulatory scheme is intended or not, it seems to me that the Commission orders and the decision in Cooley of the D.C. Circuit is quite convincing in explaining that Congress in enacting the 1920 Act and then in the 1935 amendments made a quite clear distinction between the Commission's mandatory jurisdiction and its voluntary jurisdiction, and that these projects are subject to—are in a gray area between the 1920 and 1935 Act that are subject to voluntary jurisdiction.

Now, it is true that the legislative history is not terribly clear on this, but I think it is important to recall that the whole question of how relicensing would be handled was quite unclear until several years ago when licenses started to expire and the whole problem of relicensing arose.

Also, the whole possibility of claim-jumping or, to put it in a more positive light, the possibility that new entrants into the market with better ideas on how to manage a project both from an energy point of view and an environmental point of view, is a product of the independent power industry that was created by PURPA and other laws of the last 10 years.

In the past, utilities were the sole providers of power; there was no opportunity for independent players to seek to obtain existing utility generating facilities or to build independent electric generating facilities and sell the power to utilities.

So it seems to me that the law is fairly clear, and that there is no reason to believe that the effect that the opportunity for competition in this area was not all unintended. Indeed, the general rule in this area is in favor of competition and limited licenses.

A couple of other points. As the matter of a lot of these projects being small, I do not know that for a fact although I suspect it to be true. There are a couple of points. One is that a project that may be small from an energy point of view may be important from an environmental point of view.

I cite simply one unlicensed hydroelectric project which American Rivers is intimately familiar with, and that is the Swan Falls Hydroelectric Dam, a very small dam on the Maine/New Hampshire border on the Saco River. All the other dams on the mainstem Saco are subject to Commission licensing, and an active effort is underway through the relicensing process to have fishways installed in each of those projects. The Swan Falls Dam, because it is not under Commission jurisdiction, we find it is impossible to bring into a basinwide effort to achieve salmon restoration, because it is not subject to Commission licensing. And therefore simply because the Project is a small electric generator it does not mean that there is not a major public interest in how it should be managed.

Also, I suspect in projects that were constructed on nonnavigable waters prior to 1935 in many cases have unexploited hydroelectric generating capacity that can and should be exploited.

Also, with respect to the issue of the smallness of the project, the Commission does have an exemption process that is tailored to deal with small projects that relieves applicants of many of the burdens of the regulatory process. And that is perfectly adapted to this situation.

Another point is that of States' rights. I was surprised to hear that statement because in my experience the States very much are advocates of assertion of Commission jurisdiction, and I draw that experience largely from the State of Maine which has perhaps the largest number of unlicensed hydroelectric projects in the country. And the reason for that is fairly simple.

Over the years, the Federal Energy Regulatory Commission and State and Federal resource agencies have worked out a relationship and a mode of operating. The States rely on the Commission to enforce the terms and conditions of a license. Even when States have laws, and in many cases they do not have laws on the book to deal with dam safety and environmental issues at dams, they do not exercise that authority. The State of Maine has had authority for many years to require fishways at its dams in the State of Maine. It has never invoked that authority. It has always preferred to go the route of trying to bring projects under the FERC regulatory scheme.

One of our concerns about this legislation is that it seems to run contrary to the efforts of the Commission to bring unlicensed hydroelectric projects under license. There are, to my understanding, somewhere between 300 and 500 unlicensed hydroelectric projects in the United States. I understand that as the Commission wades its way through that long list, something on the order of 50 percent turned out to be projects on navigable waters and otherwise, clearly subject to Commission jurisdiction. We view that as an important program to make sure that projects are properly operated from a safety point of view. The primary emphasis of that program is to identify projects that present a safety hazard and to make sure that they are brought under appropriate regulation and that they are safe and that, in this the 100th anniversary of the Johnstown Flood, we do not have dams breaking because of inadequate overview. The program also is a useful way of identifying projects that present environmental problems.

Finally, we are concerned—and Kristine Nygaard alluded to this—that the bill seems not only to restrict the Commission's jurisdiction with respect to projects subject to voluntary jurisdiction—that is, restricted by requiring the Commission to issue a license only to the present dam owner. But it seems to cut into the Commission's mandatory jurisdiction over projects that would be located on Federal lands or that would be downstream from Federal dams or would have an effect on downstream navigable capacity. Kristine acknowledged that she knew of no such projects, but I dare say that the Commission knows very little about the 300 to 500 unlicensed operating projects that it has in its inventory. And I suspect there are a fair number of those which are subject to mandatory jurisdiction that would be affected by this bill. And I do not believe there is any intent to affect that jurisdiction, and I think at minimum the bill should be clarified to indicate that.

If I could just state in conclusion, we think there is a problem, and it should be addressed. And we think the way to address that is by amending PURPA. The concern here is that a project could be taken and then sold back to the utility at a substantially higher rate. That problem could be dealt with by making clear that a PURPA developer simply cannot come in and take over a project and then continue to operate exactly as it has been operated before but reap much greater profits from it.

If that approach were followed, the situation Orange and Rockland is faced with, I think, could be dealt with and, at the same time, healthy competition, both from the point of view of maximuming generating capacity at existing projects and from the point of view of environmental mitigation could be preserved.

[The prepared statement of Mr. Echeverria follows:]

American Rivers

TESTIMONY OF JOHN D. ECHEVERRIA
AMERICAN RIVERS, INC.
AND DAVID R. CONRAD
NATIONAL WILDLIFE FEDERATION
ON S. 635
SUBCOMMITTEE ON WATER AND POWER
COMMITTEE ON ENERGY AND NATURAL RESOURCES

MAY 18, 1989

Mr. Chairman, members of the committee, my name is John D. Echeverria, and I am the General Counsel of American Rivers, Inc., the nation's principal river conservation organization with over 11,000 members around the country. I am submitting this testimony on behalf of American Rivers and also on behalf of National Wildlife Federation, National Audubon Society, Environmental Policy Institute, and Friends of the Earth. David R. Conrad of the National Wildlife Federation assisted in preparing these comments.

S. 635 would amend the Federal Power Act to prohibit the Federal Energy Regulatory Commission from issuing an original license for an existing hydroelectric project on a nonnavigable waterway on which no construction has taken place since August 1935, to anyone other than the present owner of the project. In general, persons desiring to construct or operate hydroelectric facilities in the United States are required to obtain licenses from the Commission. Owners of the projects that are the focus of this bill (certain pre-1935 projects built on nonnavigable streams), which may number in the several hundreds, are not required to obtain a Commission license. But the Commission has jurisdiction to issue a license to any person who voluntarily

801 Pennsylvania Ave., S.E.
Suite 303
Washington, D.C. 20003
202-547-6900

seeks a license for such a project. S. 635 would limit the range of potential applicants for licenses for these projects to the present dam owners.

American Rivers, the National Wildlife Federation, and the other conservation groups oppose the enactment of S. 635 as drafted. While we believe the essential objective of S. 635 -- to protect consumers from unjustified rate increases due solely to changes in hydroelectric project ownership --is sound, the proposed legislation sweeps far too broadly. The legislation would eliminate healthy competition in hydroelectric licensing and tend to encourage inefficient management of hydroelectric resources from both an environmental and an energy standpoint.

As we understand it, S. 635 is intended to deal with the situation where a third party might obtain a Commission license for an existing, unlicensed project owned by and operated by a utility and then, relying on the provisions of the Public Utility Regulatory Policies Act (PURPA), sell the power back to the utility at an inflated price. The result could be increased costs to consumers and potentially unreasonable profits for the successful third party, with no net addition to the region's energy supply or improvement to the project or its operation.

In our view, the actual source of any concern is not the Federal Power Act, but PURPA and the manner in which the Commission and some states have implemented PURPA. If "avoided cost" rates accurately reflected the value of power being provided by PURPA-qualified facilities, there would be no economic incentive for PURPA-inspired takeovers that produce no public benefit. It is possible that an amendment to PURPA is needed to clarify that the benefits of that law should not be available to a firm that simply takes over an existing hydroelectric facility and operates it on the same basis as the prior owner. But amending the Federal Power Act is not necessary.

Furthermore, S. 635 as drafted would have several serious adverse consequences.

1. Stifle Healthy Competition in Hydroelectric Licensing. In the Electric Consumers Protection Act of 1986, the Senate decided not to extend a preference to any class of applicant in relicensing in the belief that open and equal competition for a new license for an existing hydroelectric project would facilitate the optimal development of the project. Section 15 of the Federal Power Act, as amended by ECPA, directs the Commission to issue a new license "to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest," provided only that a project shall not be transferred as a result of "insignificant differences" between the license applications.

S. 635 takes the opposite tack. It would change existing law in order to grant the owners of certain existing hydroelectric dams what would amount to a perpetual franchise over their projects and free them from any potential competition. That approach had nothing to recommend it in ECPA and it should not be adopted for this class of existing hydroelectric projects either.

S. 635 would significantly reduce the opportunities for project improvement provided under current law. The bill would prohibit third parties with sound proposals for improving the efficiency or environmental management of an unlicensed project from placing their proposals before the Commission. For example, in the Orange & Rockland case, which apparently has given rise to this bill, Rio Associates proposes to both expand the generating capacity of the Rio project and supply water to a dewatered stretch of the Mongaup River by constructing a new powerhouse adjacent to the dam. S. 635 would cut off the flow of similar, innovative ideas at other projects.

If S. 635 were enacted, an existing dam owner would be certain that the project could not be taken over by a competitor with a superior proposal for operating the project, and would have less incentive to manage the project at an optimal level. Indeed, to avoid the expense of the licensing process, and to avoid obtaining a Commission license with a fixed term, some dam owners would continue to operate highly inefficient plants outside of Commission jurisdiction rather than undertake cost-effective improvements that would trigger Commission licensing requirements.

Hydroelectric projects that are the object of this legislation, like the projects addressed in ECPA, utilize a public resource -- rivers. In both cases, actual competition between applicants, as well as the potential for competition, serve as a spur to ensure that projects make the best possible use of this public resource. ECPA's new relicensing standards dealt with previously licensed projects, all or most of which are under the Commission's mandatory jurisdiction, rather than with projects that are subject to the Commission's voluntary jurisdiction, which are the focus of S. 635. But that distinction should not affect how the Senate resolves the basic policy decision whether to promote or stifle competition in hydroelectric licensing.

It is not unfair to subject owners of unlicensed, pre-1935 dams on nonnavigable streams to the same type of competition as other dam owners. First, the statutory language and the relevant case law show that there is nothing unintended about the assertion of Commission licensing jurisdiction over these projects. As explained in great detail in the Commission orders upholding the concept of voluntary Commission jurisdiction, and in Cooley v. FERC, 843 F.2d 1464 (D.C. Cir. 1988), section 4(e) of the Federal Power Act grants the Commission licensing authority that is broader than the licensing requirements of section 23. Furthermore, the original Federal Water Power Act of 1920 established a voluntary scheme of licensing for projects subject to federal jurisdiction because of their effects on interstate commerce. As explained in the Cooley decision, the legislative history of the 1935 amendments to the Federal Power Act, which expanded the scope of the Commission's mandatory jurisdiction and established the Commission's current jurisdictional scheme, does not suggest that Congress intended to cut back on the scope of the Commission's voluntary jurisdiction.

Second, it would be anomalous for owners of dams constructed prior to 1935 on nonnavigable rivers to be granted what amounts to a perpetual franchise over their projects. Owners of most hydroelectric projects subject to the jurisdiction of the Federal Power Act are entitled to licenses with a maximum term of fifty years. At the end of the license term, the Commission can recommend that ownership of the project be transferred to a federal agency, grant a new power license for the project to the current owner or to another person, or issue a nonpower license for the project. In the event of a transfer of ownership, the original licensee is legally entitled to recoup only its net investment in the project, depreciated over time, plus severance damages.

Furthermore, S. 635 would grant owners of existing dams a kind of franchise more permanent even than that held by dam owners whose projects were constructed pursuant to Congressional authorization granted prior to 1920. Many of these congressional authorizations were for a fixed term. See In re Clifton Power Corporation, 39 FERC P 61,116 (May 5, 1987). Even when Congress failed to establish a specific term in the authorization, the legislation commonly made it clear that Congress reserved the right to alter, repeal, or amend the authorization. See Clifton, note 23. By contrast, S. 635 would, in effect, encourage existing dam owners to remain in a permanently unlicensed status, free from any competition.

2. Interfere with Commission Enforcement Program. Another likely adverse consequence of the enactment of S. 635 is that it would delay and complicate the Commission's efforts to bring under license projects subject to the Commission's mandatory licensing jurisdiction.

As the Committee is aware, the Commission staff is engaged in a major effort to ensure that existing hydroelectric projects that should be licensed are licensed. The primary purposes of this effort are to bring under appropriate regulation dams that present a high danger to public safety, and to mitigate serious environmental problems at existing dams. The Commission's jurisdictional investigations are already difficult and time consuming. It is often a formidable task for the Commission staff to marshall the historical evidence on whether or not a project is located on a navigable stream.

S. 635 would thwart the Commission's effort by substantially increasing the stakes of the jurisdictional issue. At present, a determination that a project is on a nonnavigable stream generally leaves open the possibility of either the owner or a third party voluntarily seeking a license for the project. If S. 635 were enacted, however, a determination that a project were not on a navigable river would also grant the owner a perpetual franchise over the project. In that case, the dam owner would be willing to devote virtually unlimited legal and other resources to the jurisdictional issue, increasing the Commission's workload, and requiring the Commission to expend more resources on these issues.

3. Reduce Existing Commission Jurisdiction. S. 635 gives up, perhaps inadvertently, several aspects of the Commission's mandatory jurisdiction. Under section 23(b) of the Federal Power Act, see 16 U.S.C. 817, the Commission currently has mandatory jurisdiction over any project on a navigable waterway, on federal land, or utilizing surplus water or water power from a federal dam, as well as any project proposed to be constructed (after 1935) on any stream over which Congress has jurisdiction under the Commerce Clause, if the Commission determines that the interests of interstate or foreign commerce would be affected by the project. In addition, it is our understanding that the Commission has jurisdiction over certain projects on nonnavigable water if the projects affect downstream navigable capacity or have an operational connection with a downstream development for which licensing is otherwise required.

We understand that S. 635 is intended to restrict the Commission's licensing authority over pre-1935 projects not located on navigable streams that are subject to voluntary Commission licensing. But the language of the bill also would require the Commission to grant an original license only to the owner of a pre-1935 project on a nonnavigable stream that is located on federal land, that utilizes the water or water power from a federal dam, or that is located on nonnavigable waters but affects downstream navigable capacity or is connected to a downstream development under Commission jurisdiction. Such projects are under the Commission's mandatory jurisdiction, and we are unaware of any justification for eliminating this existing jurisdiction. We urge the Committee to exercise care so that the Commission's mandatory jurisdiction over hydroelectric projects not be inadvertently reduced.

* * *

Thank you very much for this opportunity to testify. David Conrad of the National Wildlife Federation and I would welcome the opportunity to work with the Committee to identify and develop those changes in existing law that may be necessary to protect consumers, without unintended adverse consequences to the natural environmental.

Senator **Bradley**. Thank you very much, Mr. Echeverria. We have one more witness, Mr. Malcolm Marshall, of the EEI. Mr. Marshall, would you come up next to Mr. Turner and give us your comments?

STATEMENT OF MALCOLM MARSHALL, EDISON ELECTRIC INSTITUTE

Mr. **Marshall**. Thank you, Mr. Chairman. I think it worked out fine that I did not appear right after Mr. Roque because the three gentlemen that spoke all spoke on the same subject of S. 635 as it now stands. We, of course, like the rest of Edison, support S. 635 to the extent that it now stands, but a different problem is exemplified by a situation with respect to a project of our company, which we believe also merits attention.

There are two independent, although sometimes related, bases of Federal licensing jurisdiction over dams or other hydro projects. First, that the stream involved in a navigable stream. Second, that the project would have other effects on interstate or foreign commerce. With respect to many streams, the question of navigability may present a close factual question. Prior to the Water Power Act of 1920, there was no procedure pursuant to which a company contemplating construction of a dam or other project could obtain in advance of that construction a determination of these jurisdictional bases. Congress acted in the 1920 Act for the express purpose of filling that gap and expressly in the legislative history to provide a procedure by which such advance determination of Federal licensing jurisdiction could be obtained. That procedure was that a company contemplating construction of a project would file a declaration of intention. The statute directed the Commission then to conduct an investigation and to make formal findings on these jurisdictional bases. The statute then provided that if the Commission did not find the jurisdictional bases to exist, the Congress in the statute granted permission for the construction and operation in compliance with State laws.

After passage of the 1920 Act and prior to the 1935 Act, a number of companies, including our company, availed themselves of that procedure. We filed a declaration of intention. The Commission conducted an investigation. The Commission entered a formal order still of record in its order books, never changed, never appealed from, never altered to the effect that the stream was nonnavigable and the project would have no effect on interstate or foreign commerce. The project was built, placed in service in 1925 and operated for over 60 years under State law pursuant to the Congressional permit granted in the 1920 Act. The present Commission, without any Congressional authorization, directly contrary to the procedure that I have outlined established by Congress in the 1920 Act, undertook in 1987 to address anew the question of navigability of the stream. It totally ignored the 1920 Order of the Commission, again never changed, purported—I said the Commission on this spoke, Office of Hydro Power Licensing—purported to make a new finding of navigability contrary to the Commission's own prior finding that is still on its books.

We have worked with the staff, and we have submitted a short version because we understood that the staff wanted as little disruption to the wording of the statute to tell the Commission that when the Congress set this procedure up in 1920 so that parties could obtain this advanced determination of these jurisdictional bases, whether they existed or not, Congress meant what it said.

We got our determination, and it is our position that the Commission cannot now go back 65 years later and alter it. And we ask this body to tell the Commission that in 1920 it meant what it said.

The last gentleman who spoke spoke on the matter of whether the States want Federal involvement in these matters. I do not know how influenced you were by that, but I would like to tell you and I would like to enter into the record that our State agency that supervises this dam has supervised it very actively. We have a 2-year $100,000 safety inspection that inspects it every year, and our State agency has filed in a proceeding which the Commission has initiated relative to this project, its comments asking the Federal Commission to keep hands off and let the State continue to regulate and supervise and control the operation of this dam as it has done for 60-odd years.

Thank you for the opportunity.

[The prepared statement of Mr. Marshall follows:]

WRITTEN STATEMENT OF

THE EDISON ELECTRIC INSTITUTE

ON

S. 635

BEFORE THE
SUBCOMMITTEE ON WATER & POWER
OF THE
COMMITTEE ON ENERGY AND
NATURAL RESOURCES

UNITED STATES SENATE

May 18, 1989

The Edison Electric Institute (EEI) is the association of the nation's investor-owned electric utilities. Its members serve 95 percent of all customers served by the investor-owned segment of the industry. They generate approximately 77 percent of all the electricity in the country and serve 73 percent of all ultimate customers in the nation.

In generating and distributing electricity, a majority of our member companies rely on hydroelectric power as an important source of electricity. Hydropower accounts for approximately 10 percent of the nation's electric energy requirements. Investor-owned utilities operate hundreds of licensed hydroelectric projects that serve more than 40 million customers in 41 states. Nationwide an estimated 100 million Americans benefit from this fuel-free source of power. Hydroelectric power is a clean, efficient, safe and renewable source of power, and is the lowest-cost electricity generated.

Thirty of our member companies own at least 68 1/ federally unlicensed hydroelectric power projects that would benefit from S. 635. These are primarily smaller projects whose average size

---

1/ See Attachment 1 for the list of projects.

is only 8.6 MW compared to currently licensed projects which average greater than 60 MW in size. Some estimates indicate that there are four to five times as many unlicensed hydro projects than owned by EEI member companies, and of the 239 projects2/ more than half have a capacity of less than 1 MW.

As S. 635 presently stands, it is intended to prohibit third parties from obtaining licenses for pre-1935, unlicensed hydro projects located on non-navigable waters with no post-1935 construction. S. 635 does not expand the Federal Energy Regulatory Commission's (FERC) licensing jurisdiction over unlicensed hydro projects; it only defines the universe of people who would be eligible to obtain licenses on these pre-1935 unlicensed hydro projects. This bill does not require current owners of these pre-1935 unlicensed hydro projects to seek federal licenses. Further, S. 635 reaffirms the congressional intent expressed in 1935 by ensuring that the owners of these pre-1935 projects remain free to operate them without being forced directly or indirectly to seek federal licenses.

2/ It is unclear exactly how many unlicensed hydro projects are in operation. A 1987 FERC report indicated that there were 341 unlicensed hydro projects, however, a 1989 report provided by FERC to the Energy & Power Subcommittee of the House Energy & Commerce Committee listed 239 unlicensed hydro projects. Part of the difficulty in identifying these projects is due to the fact that they are typically very small projects located on small streams.

Fifty-four years ago, in 1935, Congress in amending section 23(b)[3] of the Federal Power Act (FPA) provided in effect that projects located on non-navigable waters and operated based on pre-1935 construction would not be subject to federal jurisdiction and the licensing requirements of the FPA. These projects operated free of any claim of federal jurisdiction until 1988, when FERC, in Orange & Rockland Utilities, Inc., 44 FERC ¶ 61,236 (1988), abruptly changed its and ignored the courts' prior interpretations of FERC's licensing authority under the FPA . In Orange & Rockland FERC interpreted its authority under section 4(e)[4] of the FPA to permit issuance of licenses on these pre-1935 projects which are unimproved and not located on navigable waters so long as the applicant "volunteers" for a license. In the case of Orange & Rockland the "volunteer" was not the owner of the Rio Project, since the owner had been determined by FERC to be free from federal licensing jurisdiction. Rather, it was a third-party claim jumper, Rio Hydroelectric Associates (Rio Associates), an out-of-state group of PURPA-motivated opportunists.

---

[3] Section 23(b) states in relevant part, "any person intending to construct a project on a non-navigable waterway over which congress has jurisdiction under the Commerce Clause shall before such construction file declaration of such intention with the Commission." If the Commission finds the interests of interstate commerce affected, the project owner "shall not construct, maintain or operate such dam. . .until it shall have applied for and shall have received a license. . . ." This provision only applies to projects constructed after its passage in 1935.

[4] Section 4(e) gives the authority to the Commission to "issue licenses to citizens of the United States. . .for the purpose of constructing, operating and maintaining dams. . .from or in any of the streams or other bodies of water over which congress has jurisdiction under its authority to regulate Commerce. . . ."

The facts in the Orange & Rockland matter vividly illustrate the injustice FERC is imposing on owners of this class of hydro projects previously held to be exempt from FERC jurisdiction. On January 29, 1981, Orange & Rockland filed with FERC a request for a disclaimer of jurisdiction over the Rio Project, and a notice of intent to file under section 23(b) a license application for the project if it were determined to be jurisdictional. FERC took no action on this filing for more than six years. Finally, on April 6, 1987, FERC issued an order finding, among other things, that the Rio Project was not jurisdictional, and therefore, not required to be licensed by the FPA. Notwithstanding its lack of licensing jurisdiction under section 23(b), FERC has accepted and is actively processing an initial application for a license for the Rio Project from Rio Associates. This application was filed on December 30, 1985, during the six-year period when Orange & Rockland's filing on the FERC jurisdictional matter was pending.

On May 18, 1988, Orange & Rockland filed a request before FERC to dismiss Rio Associates' license application for lack of jurisdiction. FERC denied Orange & Rockland's request, and Orange & Rockland appealed the FERC determination that it had jurisdiction to accept Rio Associates' license application. The U. S. Court of Appeals for the Second Circuit dismissed the appeal, accepting FERC's claim that Orange & Rockland's appeal was premature because FERC had not actually issued a license to Rio Associates. To our knowledge, currently no cases are pending before FERC or the courts involving the issue of FERC's licensing authority under section 4(e) of the FPA over this class of unlicensed hydro projects. Therefore, legislation such as S. 635 is necessary to clarify this matter with respect to Orange and Rockland, as well as the owners of the other unlicensed hydro projects whose status is now uncertain.

We support S. 635 to the extent that it affirms that the FPA allows these owners to continue to operate their projects as Congress intended in 1935, subject to state licensing and regulatory jurisdiction and free from the risk of third-party claim jumpers. If S. 635 is not enacted, the practical consequences of FERC's Orange & Rockland ruling will mean that project owners will face the dilemma of whether to seek a federal license (hoping to protect themselves from third-party takeovers) or, by continuing to operate as an unlicensed project as the law has authorized, risk losing the projects to third-party claim jumpers who volunteer for a license.

One of the inequities arising from FERC's novel interpretation is that third parties may be motivated to seek licenses for unlicensed hydro projects to take advantage of the benefits offered under the Public Utility Regulatory Policies Act of 1978 (PURPA). Under that law, if an original electric utility company owner loses a project to a third party, the former project owner might be required by PURPA to purchase power from the new owner/qualifying facility at the utility's avoided cost.[5] The additional costs to the utility would be included in the utility's cost of service and passed on to the utility's customers in the form of higher electric rates. For example, if Rio Associates is granted a license for the Rio Project, the cost that Orange & Rockland might have to pay for this electricity from the Rio Project could increase by more than $50 million over the 30-year term of the license above what it would have cost Orange & Rockland to produce the electricity. These increased costs, for the source of electricity Orange & Rockland is now producing, would be borne by Orange & Rockland's customers.

FERC's interpretation of its section 4(e) jurisdiction to license these projects in the Orange & Rockland matter is unsupported by the FPA and its legislative history, and is bad public policy. This is usually the result when an agency tries to do indirectly what Congress has not authorized it to do directly. The public will be harmed whether the owners spend hundreds of thousands of dollars on licensing these facilities, whether owners shut down operations because of economic considerations brought into play by the licensing burdens, or whether third parties take over the project works. The equities of this situation call for this legislation, which prevents third-party takeovers of existing hydroelectric power facilities not subject to FERC jurisdiction under section 23(b) of the FPA.

---

[5] Note that these third parties must meet certain requirements in order to be a "qualifying facility" and receive these benefits under PURPA.

Other serious problems exist resulting from FERC's current efforts to license now unlicensed projects, even though, under the FPA, many such projects clearly are outside FERC's licensing jurisdiction. As S. 635 now stands, it would correct the described problems in the Orange & Rockland situation. However, EEI submits that one other problem should be corrected in this legislation. Since specifics usually are more informative than generalities, this additional problem will be described in its relation to a project, Dix Dam, owned and operated by Kentucky Utilities Company (KU).

Two bases exist for federal licensing jurisdiction over dams on streams: the stream is a navigable water of the United States, or the project will have effects on interstate or foreign commerce. With respect to many streams, the question of navigability may present a close factual question. Prior to 1920, no procedure was available by which a party intending to construct a dam could obtain, in advance of construction, a decision as to the navigability of the stream, and, therefore, the existence of federal jurisdiction. In the Federal Water Power Act of 1920, Congress--for the expressed purpose of creating such a procedure--provided that a party intending such construction could file a declaration of such intention and obtain from the Federal Power Commission (now, the Federal Energy Regulatory Commission) a determination both of navigability of the stream and of whether the project would have any effect on commerce.

After passage of the 1920 Act, KU filed its Declaration of Intention to construct a dam across Dix River in central Kentucky. In discharge of its statutory duty, the Commission investigated the matter and, in a formal Order issued January 24, 1922, found "from such investigation that the proposed dam is above the navigable portion of Dix River," and voted that "the interests of interstate or foreign commerce will not be affected by the proposed construction." Dix Dam and hydroelectric station were completed and placed in service in 1925 and, pursuant to provisions of the 1920 Act, during the 64 years since 1925 have been operated as authorized by Congress, beyond the scope of federal jurisdiction, in compliance with State laws.

FERC's current program, of acting without congressional authorization to require licenses for previously unlicensed dams and hydro projects, includes an attempt to require a license for Dix, even though such project was constructed and for over 60 years has been operated under state law, pursuant to the congressionally established procedure and congressional authorization granted in the 1920 Act. In FERC's overzealous effort to require a license for the Dix and other similarly situated projects, FERC would ignore the fact that, as required under the procedure prescribed by Congress in 1920, the 1922

Commission conducted its investigation and entered its Order finding the river to be non-navigable and holding that the project would not affect interests of interstate commerce. In disregard of such 1922 Order, the FERC staff undertook to make a current finding, in 1987, that before construction of Dix Dam 64 years ago, or at some even earlier time, the river in fact was navigable. Such action of the Commission would be in derogation of KU's rights resulting from its having followed the congressional procedure and having thereby obtained the pre-construction Commission determination of non-navigability.

EEI supports language which has been suggested to this Committee's staff, with request for its addition to S. 635, which would so amend the FPA as to prevent FERC from disregarding established congressional procedures, formal Federal Power Commission determinations pursuant to such procedures, and resulting rights of companies which carefully observed and followed those procedures. EEI urges the inclusion of such provision in S. 635.

Regulation of pre-1935 hydro projects as described in this testimony is an area that historically has been left to the states. Requiring a federal license is unnecessary since these hydro projects have been operating in the public interest safely and in an environmentally sound manner for more than 50 years. FERC may argue that this class of hydro projects should be federally licensed because of dam safety concerns. However, the states and the federal government[6] have the authority to regulate dam safety on this class of projects and many states have active programs in this area.[7] Further, licensing of these projects by FERC in the West at this late date could disrupt the existing state water rights and allocation systems for the affected streams.

The project owners have relied on the congressional declaration that they did not have to license these projects. To attempt to indirectly compel them to license them 50 years later without a change in any circumstances including any change in the law is unwise and unjust. As stated previously, S. 635 would not require these pre-1935 projects to be licensed, unless an owner voluntarily seeks a license, because that was Congress' intent when the FPA was amended in 1935.

Another important consideration is that filing for a license would be very expensive for project owners. For example, Orange and Rockland estimates that it will cost approximately $500,000 to license its Rio Project. Then, once a project is licensed, FERC assesses annual fees on the project. Some of the identified 239 unlicensed, pre-1935 hydro projects are small projects, and it will be simply uneconomical to license them. If those project owners were forced to seek licenses, this would result in either the shutdown of many small, yet reliable hydroelectric power projects or increased costs to the consumers of the electricity from these projects with little or no public benefit in return. Such consequences would be bad public policy.

---

[6] See, the National Dam Inspection Act, Pub. L. No. 92-367 (1972), 33 U.S.C.A. § 467a, 33 C.F.R. § 222.8.

[7] All states but two have applicable dam safety statutes. See, Federal Emergency Management Agency, "State Non-Federal Dam Safety Programs -- 1985."

Without compelling justification, FERC is trying to do indirectly, using its novel interpretation of section 4(e), what it is without jurisdiction to ~~do~~ directly under section 23(b). Driven by unfounded policy considerations, FERC's interpretation of section 4(e) places unlicensed hydro projects at risk from third-party "claim jumping," and thus, forces the owners to seek licenses for fear of losing their projects. S. 635 makes clear that owners of unlicensed project works cannot be compelled to seek licenses for such works either directly or indirectly.

We appreciate the opportunity to submit this written statement to the Subcommittee.

ATTACHMENT 1

PRE-1936
UNLICENSED HYDROELECTRIC PROJECTS
EEI MEMBER COMPANIES
1989

OWNER	PROJECT	CAPACITY (MW)
Alaska Elec. Light & Power	Gold Creek	1.60
Central Hudson Gas & Electric Corp.	Dashville	4.80
Central Hudson Gas & Electric Corp.	Sturgeon Pool	14.40
Central Vermont Public Service Corp.	Carvers Falls	1.60
Central Vermont Public Service Corp.	Glen	2.00
Central Vermont Public Service Corp.	Patch	.40
Central Vermont Public Service Corp.	Pittsford	3.60
Central Vermont Public Service Corp.	Silver Lake	2.20
Duke Power	Stice Shoals	.60
Duke Power	Turner Shoals	5.50
Duke Power	Tuxedo (Lake Summit)	5.00
Edison Sault Electric Co.	Edison (Sault)	43.70
Georgia Power	Barnett Shoals	2.80
Georgia Power	Estatoah Creek, Tenn.	.24
Hawaii Electric Light Co.	Puueo	2.25
Hawaii Electric Light Co.	Waiau	1.10
Idaho Power	Thousand Springs 5	8.80
Illinois Power	Marseilles	2.024
Indiana and Michigan Electric Co.	Berrien Springs1/	7.20
Iowa Electric Light & Power	Maquoketa	1.20
Iowa Electric Light & Power	Iowa Falls	.54
Kentucky Utilities	Dix	28.257
Northeast Utilities Service Co.	Dwight	1.44
Northeast Utilities Service Co.	Indian Orchard	3.70
Northeast Utilities Service Co.	Red Bridge	3.60
Northeast Utilities Service Co.	Putts Bridge	3.20
Northern Indiana Public Service Co.	Norway	7.20
Northern Indiana Public Service Co.	Oakdale	11.00
Northern States Power Co.	Hatfield	6.00
Northern States Power Co.	St. Croix Falls	23.20
Orange & Rockland Utilities	Swinging Bridge 1	5.00
Orange & Rockland Utilities	Swinging Bridge 2	6.75
Orange & Rockland Utilities	Rio	10.00
Orange & Rockland Utilities	Mongaup Falls	4.00
Otter Tail	Bemidji	.74
Otter Tail	Dayton Hollow	.97
Otter Tail	Hoot Lake	1.00
Otter Tail	Pisgah	.52
Otter Tail	Taplin Gorge	.56
Otter Tail	Wright	.40
Pacific Gas & Electric	Coal Canyon	1.00
Pacific Gas & Electric	Lime Saddle	2.00
Pacific Gas & Electric	Hamilton Branch	5.39
Pacific Power & Light	Albany	.80

1/ This project does have a congressionally issued permit.

Unlicensed Hydroelectric Projects
EEI Member Companies
Page 2

OWNER	PROJECT	CAPACITY (MW)
Public Service Co. of Colorado	Grand Valley (Palisades)	3.00
Public Service Co. of Colorado	Shoshone	14.40
Public Service Co. of New Hampshire	Jackman	3.20
Puget Sound Power & Light	White River 1	70.00
Puget Sound Power & Light	Nooksack Falls	1.50
Sierra Pacific Power Co.	Verdi	2.40
Sierra Pacific Power Co.	Farad	2.80
Sierra Pacific Power Co.	Fleish	2.50
Sierra Pacific Power Co.	Lahontan	2.40
Southern California Edison	Mill Creek 1	.80
Southern California Edison	Ontario 1	.60
Southern California Edison	Sierra	.48
Southern California Edison	Fontana	2.95
Union Electric Co.	Keokuk L & D 19[2]	124.80
Utah Power & Light	Fountain Green	.16
Utah Power & Light	Granite	2.00
Utah Power & Light	Snake Creek	1.18
Washington Water Power Co.	Little Falls	32.00
City of Springfield, Mass.	Cobble Mtn.[3]	33.00
Western Massachusetts Electric Co.	Mungerville	3.20
Western Massachusetts Electric Co.	Putts Bridge	3.20
Wisconsin Electric Power Co.	Appleton[4]	1.94
Wisconsin Power and Light	Kilbourn	8.20
Wisconsin Power and Light	Prairie du Sac	28.44

---

[2] This project was constructed pursuant to a special act of Congress in 1905.

[3] Owned by City of Springfield but leased to Western Massachusetts Electric Company. A navigable status report has determined that the project is not located on a navigable river. (45 FERC ¶62,178) (1978)

[4] This project has a congressionally issued permit.

TOTALS:

Projects: 68
Companies: 30*
MW Capacity: 583.431

---

*Included in the above are holding companies as well as subsidiaries.

Source: Federal Energy Regulatory Commission (FERC) March, 1989. List provided by FERC to Chairman Sharp in response to questions submitted to FERC following the March 22, 1989 FERC oversight hearing.

Senator **Bradley**. Thank you, Mr. Turner, and let me thank all of the witnesses for their testimony. I think it was very helpful. And now I will turn to Senator McClure for any questions that he might have and then ask him to close the hearing.

Senator **McClure**. Thank you very much, Mr. Chairman. I only have a couple of short questions, I think, because the testimony of the witnesses has been very clear. I might say to Mr. Turner that the questions that you raised are slightly different than that addressed by the bill, and I think you recognize that. It is something that we certainly are going to look at very carefully and very closely, but I have no opinion at this time with respect to the merits of that particular case.

Mr. **Marshall**. Senator, I not only have a different question, I respectfully have a different name. I am sitting behind Mr. Turner's card.

Senator **McClure**. Well, let the record reflect that you are attached to the appropriate name.

Mr. **Marshall**. Thank you.

Senator **McClure**. Mr. Echeverria, you have raised a question about the possible reach of the statute under the wording of the proposed bill to jurisdictional dams upon which no construction has occurred. Are you aware of any such dams?

Mr. **Echeverria**. I want to emphasize that I am unfamiliar with the vast majority of the 300 to 500 dams that are in the inventory, and I think the essential point I was trying to make is I do not understand that the committee has any intent to affect the scope of the Commission's existing mandatory jurisdiction. And it could achieve its objectives without doing so.

Senator **McClure**. The witness is correct. It is not our intention to do that, but I do not know of any such situations, and that is the reason I asked the question. You had indicated something that comes as a bit of a surprise to me, and it may or may not be true. And that is that the state agencies really welcome FERC jurisdiction. Have you ever talked to Idaho Fish and Game Department?

Mr. **Echeverria**. I am less familiar with Idaho Fish and Game than I am with others. I think one of the——

Senator **McClure**. I am asking about them in particular because I am very curious to know if they have been doing something in conversations with you that they have failed to do with everybody else.

Mr. **Echeverria**. I am sure you read their minds better than I do, Senator.

Senator **McClure**. Well, I am not reading their minds, I am reading their lips. And I am serious about this because it is a very hotly held position in my State, and I think Idaho Fish and Game speaks along with State government. And you probably are aware, we have a Democratic governor; that is not a partisan political issue in my State, that says the state is going to maintain its jurisdiction and does not wish to have the Federal Government extend the jurisdiction. I was a little startled by your assertion that States welcome the Federal assertion of authority.

Mr. **Echeverria**. Maybe I can make the point clearer. Most hydroelectric facilities in any given State are subject to FERC jurisdiction and, therefore, there is a regulatory process set up to deal with that. Under the Federal Power Act, as amended by ECPA, the State agencies have a substantial role to play through the 10(g)(a) process, through the consultation process in hydroelectric regulation. And in terms of dam safety, there is obviously a mechanism set up at FERC to deal with that.

The problem with the unlicensed dams is that, in effect, it asks the States to set up a second parallel regulatory process to deal with that second category of projects. And in my experience, most States would prefer to rely on one mechanism and one bureaucratic process to deal with.

Senator **McClure**. Let me ask the question in this manner. I am not quarreling with you; I am seeking information. You have now said most States prefer. Now, is that kind of an allegorical statement, or is that a literal statement? Have you talked to the States? Do you know what they prefer? Is it your impression that they prefer? Upon what are you basing that statement?

Mr. **Echeverria**. I am basing the statement on my dealings with the FERC staff that deals with this issue, with State regulators and primarily, and I will be frank, but primarily with my experience in the State of Maine which, as I say, has scores of these projects.

Senator **McClure**. Then we will let the record reflect the fact that the State of Maine prefers that.

Mr. **Echeverria**. I cannot speak for the State of Maine.

Senator **McClure**. All right, the State of Maine may prefer that. And I say that more than just facetiously. I am trying to find out because obviously you have contacts in a way which I do not have contacts. But it is something that is a surprise to me to find State agencies welcoming the opportunity to have the Federal Government exercise authority and control on issues which are in their jurisdiction as well.

Mr. **Echeverria**. I think it is a question of whether the State would naturally want to set up a program on dam safety to deal with half a dozen unlicensed hydro projects in the State when dozens of licensed projects subject to the Commission's jurisdiction.

Senator **McClure**. I think it is correct to say that out of 50 States, 48 of them have dam safety statutes.

Mr. **Echeverria**. My understanding is that the quality of those and the seriousness with which they are pursued varies a great deal. But that is anecdotal based on my conversations with Commission staff.

Senator **McClure**. I understand the context of your statement. I just want to get it into a context which I think is substantially more limited than perhaps you believe it to be.

Are there questions that members may wish to submit for the record?

Senator Ford has asked that this question be addressed to you, Mr. Marshall, in spite of the fact that you do not have a name tag. What authority does the Commission believe it has to ignore or reverse the Commission's own finding that Dix River in Kentucky was nonnavigable?

Mr. **Marshall**. I cannot answer for the Commission, particularly because I have studied its opinion in the case and I cannot ascertain from that opinion the answer to that question. I earnestly hope that the committee will address that question to the Commission. The Commission has not indicated what their claim of authority is. In a many-page opinion, I have not been able to ascertain what they think it is.

Senator **McClure**. Thank you very much. And I have no further questions. We may have further written questions to submit to the witnesses for a response in writing. We would appreciate your response in an expeditious manner.

If there is nothing further to come before this subcommittee, the subcommittee is adjourned. Thank you.

[Whereupon, at 3:17 p.m., the hearing was adjourned.]

[A statement for the record submitted by Mr. Murphy follows:]

NIAGARA MOHAWK

NIAGARA MOHAWK POWER CORPORATION/300 ERIE BOULEVARD WEST, SYRACUSE, N.Y. 13202/TELEPHONE (315) 474-1511

STATEMENT IN SUPPORT OF S. 635 A BILL TO PREVENT THE UNINTENDED LICENSING OF FEDERALLY NONJURISDICTIONAL PRE-1935 UNLICENSED HYDROELECTRIC PROJECTS

BEFORE THE SUBCOMMITTEE ON WATER AND POWER
SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

MICHAEL W. MURPHY

SYSTEM ATTORNEY
NIAGARA MOHAWK POWER CORPORATION

MAY 17, 1989

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to comment in support of S. 635, a bill that would prevent the takeover of hydroelectric projects currently being lawfully operated without a license issued by the Federal Energy Regulatory Commission. I am Michael W. Murphy, System Attorney for Niagara Mohawk Power Corporation, an electric and gas public utility with its headquarters in Syracuse, New York

In 1935, Congress amended the Federal Power Act to require licenses for the construction of a class of hydroelectric projects that had not previously required licenses--those located on non-navigable waters but that affected interstate commerce. As subsequently confirmed in Farmington River Power Co. v. FPC, 455 F.2d 86 (2d Cir. 1972), however, when Congress amended the Act in 1935, it did not require licenses for projects on non-navigable waters that had already been constructed. The owners of those projects were left free, in the absence of significant post-1935 construction, to operate their projects without seeking a license from the Federal Power Commission or its successor, the Federal Energy Regulatory Commission.

Niagara Mohawk owns and operates numerous projects under license from the Commission. It also owns and operates three projects that were constructed prior to 1935 on non-navigable waters. These projects are the East Canada Creek Project, consisting of two hydroelectric developments with a total installed capacity of approximately 26 MW, the Oak Orchard Creek Project, consisting of two developments with a total capacity of approximately 6 MW, and the Caroga Creek Project, consisting of a single development with a total installed capacity of approximately 5 MW. The two developments of the East Canada Creek Project, named Beardslee and Inghams, were constructed in 1924 and 1912, respectively. The two developments of the Oak Orchard Creek Project, Glenwood and Waterport, were constructed in 1904 and 1920. The Caroga Creek Project commenced operating in 1911. It is fair to say that these projects, ranging in age from 65 to 85 years, have long since become integral parts of their host environments.

Niagara Mohawk has never sought to avoid Commission jurisdiction regarding these projects. Indeed, Niagara Mohawk filed license applications for each of these three projects with the FPC in 1967. More than 12 years later, in 1980, FERC issued orders dismissing the three license applications, finding that no basis for Commission licensing jurisdiction existed. Under the law as it was then understood, Niagara Mohawk was secure in the knowledge that it could continue to operate its projects without interference.

Recently, however, FERC has apparently concluded that anyone, and not just a project owner, may volunteer for a license for a lawfully unlicensed operating project. If the non-owner secures a license for such a project, it may then seek to condemn the project, using the power of eminent domain conferred on FERC licensees by Section 21 of the Act. Clearly, Niagara Mohawk's stewardship of the projects described above is threatened by FERC's new reading of its licensing authority under the Act. Senator McClure's bill, S. 635, co-sponsored by Senators Johnston, Gawn, Nickles, Bradley, and Murkowski, would remedy this danger by making clear that FERC may only license otherwise non-jurisdictional project works if the owner seeks a license.

The East Canada, Oak Orchard and Caroga Creek projects form valuable components of Niagara Mohawk's hydroelectric generating capacity. These projects provide a clean, renewable source of power to meet the requirements of Niagara Mohawk's consumers. Hydroelectric generating units are readily available sources of power and can be used during periods of peak demand, when electric energy is most valuable to a utility and its ratepayers. The threat that FERC's new reading of the FPA poses for Niagara Mohawk's projects is not merely theoretical. The East Canada Creek project, for example, is the subject of preliminary permit applications filed by Long Lake Energy Corporation. As we understand it, Long Lake seeks a license, so that it may acquire the appropriate interests in Niagara Mohawk's project, redevelop the project, and sell energy from the project to Niagara Mohawk at a price greatly exceeding the current cost of generating energy from the projects. S. 635 would preserve Niagara Mohawk's ownership of the existing units, without danger of interference from FERC or third parties.

Thank you for the opportunity to submit this statement.

○